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No. A-876

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

v.

JOHN WILLIAM COBB, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Did the court below err in holding that the plaintiff in an action under 42 U.S.C. § 1982 must prove that he or she is a member of a "non-white race," with the result that Jews can never state a claim under 42 U.S.C. § 1982 even where, as here, they are the victims of conduct motivated by a Ku Klux Klan and Nazi-inspired racial animus against Jews?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were appellants (now petitioners) Shaare Tefila Congregation, Rabbi Martin S. Halpern, Shirley Altman, William Harkaway, Marshall S. Levin, Maurice Potosky and Dr. Jacob Teller. Petitioners will be referred to collectively herein as "the Congregation." Appellees below (now respondents) were John William Cobb, William Randall Harris, Thomas Lloyd Heine, William Hess, Thomas Joseph Hunt, Jr., Raymond Lee Jordan, Dominic Queen and Michael David Remer. The Rule 28.1 statement regarding Shaare Tefila Congregation was made in its Application for Extension of Time to File Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit, filed May 14, 1986, at note 1.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as *Shaare Tefila Congregation* v. *Cobb*, 785 F.2d 523 (4th Cir. 1986) and is printed as Appendix A (App. 1a *et seq.*) hereto.[1] The opinion of the United States District Court for Maryland is reported as *Shaare Tefila Congregation* v. *Cobb*, 606 F. Supp. 1504 (D. Md. 1985) and is printed as Appendix B (App. 24a *et seq.*) hereto.

JURISDICTION

The Fourth Circuit's judgment was rendered and entered on March 7, 1986 (App. 36a). By order of Chief

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[1] "App." refers to the Appendix to this petition, filed separately herewith.

Justice Warren E. Burger, as Circuit Justice for the Fourth Circuit, petitioners were granted an extension of time to file this petition to and including July 5, 1986. The jurisdiciton of this Court is invoked under 28 U.S.C. § 1254(a).

RELEVANT STATUTORY PROVISIONS

42 U.S.C. § 1982 (1982)

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

Civil Rights Act of 1866
Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

STATEMENT OF THE CASE

On November 1, 1982, respondents desecrated the synagogue of Shaare Tefila Congregation with spray-painted anti-Semitic slogans and symbols, including swastikas, a

burning cross, the words "DEAD JEW," "DEATH TO THE JUDE," and "IN, TAKE A SHOWER JEW" (App. 43a, 49a-56a).[2] Respondents had gathered that evening behind a Drug Fair, which is just a short walk across a parking lot from the synagogue. While respondents drank alcohol and talked, they spray-painted the outside walls of the Drug Fair with a burning cross, the slogans "White Power" and "Arian [*sic*] Brotherhood," the initials KKK, an eagle with a swastika, a Star of David with an arrow through it, and their initials. It was at the Drug Fair that one of the respondents suggested: "Somebody should do that on a synagogue." Respondents then walked through the parking lot and defaced the outside walls of Shaare Tefila (App. 43a).

The tragic legacy of Nazi Germany and the systematic killing of over six million Jews were evoked by the paintings of swastikas, an eagle over a swastika, and the words "DEATH TO THE JUDE," "IN, TAKE A SHOWER JEW," "TOTEN KAMF RABAND," and "DEAD JEW" on the synagogue walls. The swastika was the symbol of the Nazi Party from its inception, and the phrases "DEAD JEW," "DEATH TO THE JUDE" (Jude is German for Jew), and "IN, TAKE A SHOWER JEW" refer to the Third Reich's "final solution to the Jewish problem"—the Holocaust (App. 61a-63a). The phrase "TOTEN KAMF RABAND" next to the skull and crossbones painted on the synagogue is a garbled reference to the Totenkőpfverbande, which were the "death head units" of Nazi concentration camp guards from 1936 through World War II (App. 63a). The skull and crossbones was the insignia of the Totenkőpfverbande (App. 63a).

Because respondents' acts were based on misguided ideologies that hold as a central tenet that Jews are a separate and inferior race, the Congregation filed a civil rights action in the United States District Court for

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[2] Photographs showing the defacement of the synagogue walls are at App. 51a-56a.

Maryland, seeking redress under 42 U.S.C. §§ 1981, 1982, and 1985(3) (App. 39a-48a).[3] The complaint specifically alleged that respondents' conduct "was motivated by racial prejudice in that defendants perceive plaintiffs as racially distinct because they are Jews," in violation of 42 U.S.C. § 1982 (App. 45a). Although discovery has not been completed,[4] the record below confirms the allegations. It is clear that respondents chose the words and symbols they painted on the synagogue because of their association with Nazi and KKK ideology. Respondents have identified the swastika as a Nazi symbol and all four respondents who have been deposed have identified the eagle painted on the Drug Fair as a Nazi eagle. Various respondents also conceded their understanding that the slogans "DEAD JEW" and "IN, TAKE A SHOWER JEW" referred to the Nazi extermination of Jews during World War II. For example, respondent Cobb connected the slogans painted on the synagogue with Nazi activity during World War II:

> Q. The last exhibit, Exhibit J, has a picture. Can you tell me what that picture says?
>
> A. It says, "In" and "Take a shower Jew."
>
> Q. Do you know what the historical significance of take a shower Jew is?
>
> A. I guess that's how they executed some of the Jews in World War II.
>
> Q. How?
>
> A. I guess they made them take a shower and poisoned them or something, gassed them.

Deposition of John W. Cobb (Sept. 6, 1984) at 58-59.

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[3] The Congregation also brought pendent state claims for trespass, nuisance, and intentional infliction of emotional distress (App. 46a). Jurisdiction in the district court was alleged under 28 U.S.C. §§ 1331, 1343(a)(1) and (4), 2201, 2202, and principles of pendent jurisdiction (App. 41a).

[4] The Congregation has taken the deposition testimony of respondents Hunt, Heine, Queen, and Cobb. While the motion to dismiss was pending, the Congregation sought leave to depose respondent Remer in prison pursuant to Fed. R. Civ. P. 30(a). That motion was pending when the district court dismissed the complaint.

Respondent Heine testified similarly:

> Q. What do you think about when you see the phrase, "Dead Jew?"
>
> A. About the Holocaust.

Deposition of Thomas Lloyd Heine (Oct. 19, 1984) at 76.

Various respondents also have testified that there was discussion among the defendants about the Nazis during the defacement of the Drug Fair and the synagogue. For example, respondent Heine testified that respondent Remer talked about the Nazis during the course of the desecration on November 1:

> I don't know exactly what Michael Remer said, but he was saying something about some things that he was doing. But it had to do with Nazis and stuff. He was talking about like where it took place in the Holocaust or something. . . .

Deposition of Thomas Lloyd Heine (Oct. 19, 1984) at 40. *See also id.* at 78.

The slogans and symbols painted by respondents bespeak respondents' adoption of the false and abhorrent doctrine of Nazis and the Ku Klux Klan that Jews are a distinct and inferior race. The undisputed affidavits of Robert Wolfe and David M. Chalmers, which the Congregation submitted in opposition to the motion to dismiss (App. 57a-75a), show that the Nazi and KKK bias against Jews is based on racial prejudice. Mr. Wolfe, the Chief of the Modern Military Headquarters Branch of the National Archives, is the custodian of captured documents of the Third Reich (App. 61a). Mr. Wolfe attested that "[i]t was one of the central tenets of Nazi ideology that Jews were defined as racially distinct from Aryan, or white, German citizens" (App. 63a).[5] The Nuremberg

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[5] The basis for Hitler's virulent anti-Semitism and program to exterminate the Jews was the misconceived belief that Jews are racially distinct:

Laws of September 15, 1935 and November 14, 1935 raised this notion to a legal command: Jews were declared a separate race and denied the rights of German citizens (App. 63a, 66a-75a).[6] Dr. Chalmers, one of the foremost authorities on the Ku Klux Klan and author of *Hooded Americanism: The History of the Ku Klux Klan* (2d ed. 1981), attested that "a prevalent belief among the various Ku Klux Klan groups is that Jewish people are racially distinct from whites" (App. 58a).[7]

> The Jew has always been a people with definite racial characteristics and never a religion . . . .
>
> * * *
>
> The Jewish state was never spatially limited in itself, but universally unlimited as to space, though restricted in the sense of embracing but one race . . . . It is one of the most ingenious tricks that was ever devised, to make this state sail under the flag of "religion," thus assuring it of the tolerance which the Aryan is always ready to accord a religious creed. For actually the Mosaic religion is nothing other than a doctrine for the preservation of the Jewish race.

A. Hitler, *Mein Kampf* 306, 150 (R. Manheim trans. 1943).

[6] That Nazism and other forms of anti-Semitism are motivated by racial prejudice has been judicially recognized. *See Banker* v. *Time Chemical, Inc.*, 579 F. Supp. 1183, 1186 (N.D. Ill. 1983) ("[t]he vicious anti-Semitism directed against the Jews of Nazi Germany, for example, was racially motivated . . ."); *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 567 (E.D. Cal. 1982) ("[t]he history of 'racial prejudice' against Jews throughout Europe and in this country appears to be so well known as almost not to require documentation").

[7] This conclusion is supported by other studies:

> The fundamental theme of Klan ideology is the racist doctrine of "white supremacy," a concept that has motivated the hooded orders since their inception. It serves as justification for bigotry and violence against blacks, Jews, Hispanics, Orientals and other minorities.

Anti-Defamation League of B'nai B'rith, *Hate Groups in America: A Record of Bigotry and Violence* 17 (1982).

In The Thunderbolt, the official publication of the National States Rights Party, which is ideologically linked to the Klan, J.B. Stoner, the party's national chairman, distinguished Jews from whites:

Several respondents conceded on deposition to an understanding that the slogans and symbols they painted invoke an ideology which extols a superior race, a white race that excludes Jews. For example, respondent Heine offered the following explanation of Nazi racist ideology:

> Q. Are you at all familiar with the rise of the Nazi Party in Germany in the 1930's?
>
> A. Mm hm.
>
> Q. Can you tell us what you know?
>
> A. Not too well in depth, but from what I know from books, they wanted to develop a superior race. And that's all I know.
>
> Q. Do you know what race that would be?
>
> A. Well, they described it as being tall, white hair, and real muscular, I guess. That's basically what I hear.
>
> Q. Do you know if that would include blacks?
>
> A. I don't think it would. They wanted a specific race. They wanted a specific look for the race.
>
> Q. Do you know if that would include Jews?
>
> A. No, they were against Jews. That's what they didn't want, I guess.
>
> Q. So you would say that the Nazi race is a different race from the Jewish race?
>
> A. Yeah. Yes, I would.

Deposition of Thomas Lloyd Heine (Oct. 19, 1984) at 52-53.

> The negro [*sic*] is a violent enemy and he is a biological enemy because nego [*sic*] blood destroys White blood when the two are mixed together. However, the negro [*sic*] is not the enemy. The Jew is THE enemy of our White Race and the Jew is using the negro [*sic*] in an effort to destroy the White Race that he so passionately hates.

J. Stoner, *The Philosophy of White Racism*, The Thunderbolt (Oct. 1973).

Respondent Queen also understood that the slogan "Aryan Brotherhood" (painted by respondents on the Drug Fair as "Arian [*sic*] Brotherhood") reflected a Nazi racist ideology that excluded Jews from the "white race":

> Q. Do you understand what that ["Aryan Brotherhood"] means?
>
> A. Yes.
>
> Q. What does that mean to you?
>
> A. I guess the brotherhood of blond hair, blue-eyed people, I guess.
>
> Q. So, in other words, it would be the brotherhood of people, whites who are other than Jews?
>
> A. Yes.

Deposition of Dominic Queen (Apr. 18, 1984) at 21-22.

Respondent Cobb testified that Remer spoke about the white race while he was defacing the Drug Fair:

> Q. To the right of that eagle is the term "Aryan brotherhood."
>
> A. That's what he [Remer] was talking about. I didn't know what it meant but that's what he was talking about, the white race or something like that.

Deposition of John W. Cobb (Sept. 6, 1984) at 29.

When asked why he thought a Jew seeing the phrase "Dead Jew" painted on a synagogue would feel uncomfortable, respondent Hunt replied: "It's an insult to your race." Deposition of Thomas Joseph Hunt, Jr. (Nov. 1, 1984) at 94.

Before discovery was completed, respondent Remer, through court-appointed counsel, filed a motion based on Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint in its entirety. Without hearing oral argument or considering the extensive deposition testimony, affidavits, or other material

which the Congregation submitted with its opposition to the motion, the district court granted Remer's motion to dismiss all counts of the complaint.[8] Apparently believing that whether the defendant acted out of racial prejudice turns on whether the plaintiff is a member of a "non-white" race, the district court concluded that Jews could never state a claim under sections 1981 and 1982 because permitting such a claim would allow the coverage of those sections to turn "entirely on the idiosyncrasies of individual defendants" (App. 30a).

A panel of the United States Court of Appeals for the Fourth Circuit affirmed, but filed three separate opinions. (App. 1a-23a). Judge Hall, writing for the court, concluded that he did not "find the position of Jews in this society to be analogous to that of Mexican-Americans or others commonly considered to be non-whites," and so to allow the Congregation to state a claim under section 1982 "would permit charges of racial discrimination to arise out of nothing more than the subjective, irrational perceptions of defendants. Such perceptions are not what section 1982 was intended to protect against" (App. 7a). Judge Murnaghan, who concurred with Judge Hall, agreed that respondents' "misperceptions of fact" should not confer federal jurisdiction, and concluded that "such

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[8] The deposition excerpts and affidavits cited herein were among the materials submitted by the Congregation with its opposition to respondents' motion to dismiss in the district court. The district court explained that it would not consider the extra-pleading materials because they "are inappropriate in a motion based, as this one is in part, on Rule 12(b)(1). . . ." This is a highly questionable conclusion. *See Saval* v. *BL Ltd.*, 710 F.2d 1027, 1029 n.2 (4th Cir. 1983) ("As to motions to dismiss under Rule 12(b)(1), courts may consider affidavits and other extrinsic information to determine whether subject matter jurisdiction exists."). In any event, when the district court chose to exclude the material outside the pleadings, it was bound to deny the motion unless it appeared beyond doubt that the Congregation could prove no set of facts which would entitle its members to relief. *See Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

ill mannered and unreasoned fracases" belong in state courts (App. 10a).

Judge Wilkinson dissented. He reasoned that respondents' conduct here was no more mistaken than any other act of racism, because all such acts are at some fundamental level wrongheaded and in error:

> All racial prejudice is the result of subjective, irrational perceptions, which drain individuals of their dignity because of their perceived equivalence as members of a racial group. The Civil Rights Acts of 1866 and 1871 were enacted precisely to halt the spread of violence and hatred by those motivated by such perceptions, and plaintiffs in this case, no less than those in the usual racial discrimination case, have suffered the consequences of abhorrent notions concerning racial identity and its relevance. Rather than allowing ignorance and misperception to provide their own defense, I would find the erroneous but all too sincere view of defendants that Jews constitute a separate race worthy of humiliation and degradation sufficient to bring the claim within 42 U.S.C. §§ 1982 and 1985(3).

(App. 11a (footnote omitted)).[9]

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[9] Judge Wilkinson concluded that the Congregation's claim under section 1985(3), the civil rights conspiracy statute that originated in the Ku Klux Klan Act, should be reinstated to the extent it alleges a violation of section 1982 (App. 11a). This is true because federal statutory violations constitute deprivation of "equal protection of the laws or equal privileges and immunities under the laws" which give rise to liability under section 1985(3). *See Great Am. Fed. Sav. & Loan Assoc.* v. *Novotny*, 442 U.S. 366, 376 (1979). *Accord, e.g., McNutt* v. *Duke Precision Dental & Orthodontic Laboratories, Inc.*, 698 F.2d 676, 679-80 (4th Cir. 1983) ("Section 1985(3) merely provides a remedy for the violation of rights guaranteed by federal law or the Constitution"); *Holmes* v. *Finney*, 631 F.2d 150, 154 (10th Cir. 1980) ("[I]nfringement of some federally protected right independent of § 1985(3) is required for a violation of the conspiracy statute to be demonstrated"); *Cohen* v. *Illinois Inst. of Technology*, 524 F.2d 818, 828 (7th Cir. 1975),

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's Determination that Jews Can Never State a Claim of Racial Discrimination Under Section 1982 Should Be Reviewed and Reversed Because It Is Contrary to Controlling Decisions of This Court on a Matter of Fundamental Importance.

The Court of Appeals in this case required as an essential element of a section 1982 claim that plaintiffs must show that they are members of a "racially distinct group" that is "commonly considered to be non-white[]" (App. 7a). This Court has never required plaintiffs seeking redress under the federal Civil Rights Acts to demonstrate that they actually are racially distinct from whites. To the contrary, in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), this Court held that 42 U.S.C. § 1981 prohibits discrimination against whites as well as nonwhites.[10] The Court drew its conclusion from the language of the statute which "explicitly applies to '*all* persons' (emphasis added), including white persons." 427 U.S. at 287. Section 1982 as well, by its

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cert. denied, 425 U.S. 943 (1976) ("There is . . . a requirement that the conspiracy deprive the plaintiff of a federally protected right"); *Witten* v. *A.H. Smith & Co.*, 567 F. Supp. 1063, 1071-72 (D. Md. 1983) (federal statutory rights, specifically including rights under section 1981, may serve as a substantive basis for redress under section 1985(3)).

The Congregation does not seek certiorari to review the court's conclusions that claims arising under the "full and equal benefit" clause of 42 U.S.C. § 1981 require state action and that section 1985(3) does not protect against violations of state law or, on the facts presented, the right to engage in interstate travel.

[10] Section 1981 and section 1982 both originated in section 1 of the Civil Rights Act of 1866. Thus, "[i]n light of the historical interrelationship between § 1981 and § 1982 [there is] no reason to construe these sections differently . . . ." *Runyon* v. *McCrary*, 427 U.S. 160, 171 (1976), *quoting Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973).

terms, protects "[a]ll citizens of the United States," not just non-whites.[11]

This Court has declared that "history leaves no doubt that, if we are to give [section 1982] the scope that its origins dictate, we must accord it a sweep as broad as its language." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968), *quoting United States* v. *Price*, 383 U.S. 787, 801 (1966). *Accord, City of Memphis* v. *Greene*, 451 U.S. 100, 120 (1981); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969). *McDonald* concluded that the remedial purpose of Congress can only be effectuated if the federal Civil Rights Acts protect everyone, of whatever race, who is a victim of racial discrimination. Plaintiffs must show discrimination that is racial in character

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[11] In *McDonald*, this Court rejected the argument that the statutory language affording to all persons the same right to make and enforce contracts "as is enjoyed by white citizens" limited the scope of its coverage to nonwhites. The Court explained that it had "previously described this phrase [which is found in both sections 1981 and 1982] simply as emphasizing 'the racial character of the rights being protected,' *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966)." 427 U.S. at 287. The Court further concluded that any ambiguity in the statutory language was resolved by an examination of the legislative history of the Civil Rights Act of 1866. The debates revealed that "the bill was routinely viewed, by its opponents and supporters alike, as applying to the civil rights of whites as well as nonwhites." 427 U.S. at 289 (footnote omitted). Senator Trumbull, who introduced the bill ultimately enacted as the Civil Rights Act of 1866, described it as a " 'bill . . . to protect *all* persons in the United States in their civil rights . . .' (emphasis added), and was initially described by him as applying to 'every race and color.' " 427 U.S. at 287, *quoting* Cong. Globe, 39th Cong., 1st Sess., 211 (1866) (hereafter "Cong. Globe"). In the closing debate in the Senate, Senator Trumbull responded to opponents by saying "this bill applies to white men as well as black men." Cong. Globe at 606-07, *quoted at* 427 U.S. at 290. The Court viewed the House addition of the phrase "as is enjoyed by white citizens" as a "technical amendment without substantive effect." *Id.* at 291.

in order to be protected, but not that they are in fact racially distinct from any other group.[12]

McDonald leaves no room for a Court of Appeals to require that a victim of racial discrimination struggle to bring himself within a particular racial classification in order to show that he is covered by the statutes emanating from the Civil Rights Act of 1866. As Judge Wilkinson stated in dissent:

> Without so much as a hint as to the affirmative reach of § 1982, the majority asserts *ipse dixit* that defendants' actions 'are not what section 1982 was intended to protect against.' [App. 7a] This conclusion cannot withstand analysis. Federal civil rights laws protect citizens from acts of discriminatory intent. The discrimination found here is no different in character or consequence from that found in every racial discrimination case. Misperception lies at the heart of prejudice, and the animus formed of such ignorance sows malice and hatred wherever it operates without restriction. By removing the restriction of federal laws, the majority allows racial motivations greater latitude to effect their intolerable aims. There is simply no good reason why we should interpret this statute to protect against some forms of racial animus but not others.

(App. 13a).

Moreover, the Fourth Circuit's analysis attempts to inject into litigation under the Civil Rights Acts some objective and technical, but undefined, notion of "race," and then requires the plaintiff to show that he or she is, in fact, non-white or "racially distinct." The day should be

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[12] *Accord, Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968) ("§ 1 [of the 1866 Act] was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute"); *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966) ("[t]he legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality").

long past when any court involves itself in the task of defining what ancestry or percent of "blood" descent qualifies any of us for membership in a given race.[13] Setting federal courts to this task is inappropriate and unnecessary because it involves " 'precisely the kind of stereotyping which the civil rights statutes were designed to prevent.' " Wilkinson, J. (App. 21a), quoting *Khawaja* v. *Wyatt*, 494 F. Supp. 302, 305 n.1 (W.D.N.Y. 1980). Moreover, a requirement of proving racial membership is a meaningless test because there exists no straightforward, objective definition of "race" to which anthropologists or sociologists universally subscribe.[14]

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[13] *See Perez* v. *Lippold*, 32 Cal. 2d 711, 198 P.2d 17 (1948) (Traynor, J.) (miscegenation law unconstitutionally vague because court is unable to determine "race" of individuals to which statute applies); *Messina* v. *Ciaccio*, 290 So. 2d 339, 341-42 (La. App. 1974) (ruling that statute, later repealed, can virtually never prohibit designation of individual as Caucasian, because such a prohibition would require "a genealogical charter on each person in a questioned person's ascending line to determine with the exactness required by the statute the percentage of Negro blood ascribed to each ancestor").

[14] *See, e.g., United States* v. *Bhagat Singh Thind*, 261 U.S. 204, 212 (1923) ("The various authorities are in irreconcileable disagreement as to what constitutes a proper racial division. . . . [T]o arrange [the varieties of mankind] in sharply bounded divisions is an undertaking of such uncertainty that common agreement is practically impossible.") *Accord*, A. Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* 23 (5th rev. ed. 1974); A. Montagu, *The Concept of Race*, in *The Concept of Race* 16-17 (A. Montagu ed. 1964); J. Hiernaux, *Problems of Race Definition*, 17 Int'l Soc. Sci. J. 115 (1965) ("Race is not a fact; it is a concept, and one which by no means has the same meaning for every biologist today."); Littlefield, Lieberman, & Reynolds, *Redefining Race: The Potential Demise of a Concept in Physical Anthropology*, 23 Current Anthropology 641, 646 (1982) ("Although the [view that race has no objective meaning] was rarely expressed in physical anthropology texts before 1970, it had become the most frequent view by 1975-79, with only one-quarter of the textbooks continuing to argue for the validity of the race concept."); S. Washburn, *The Study of Race*, in *The Concept of Race* 251 (A. Montagu ed. 1964); S. Molnar, *Human Variations: Races, Types, and Ethnic Groups* 22 (1983).

The Fourth Circuit also raises the spectre that a plaintiff must be "commonly considered" to be non-white as a prerequisite for the protection of section 1982. Even if this were an appropriate criterion, the plaintiffs here were never given an opportunity to show the prevalence of the view that they are racially distinct.[15] As Judge Wilkinson pointed out in dissent:

> [T]he majority's assertion of the common perception of Jews is totally unsupported. The level and persistence of racial violence against Jews . . . certainly suggests that the misperceptions here are shared by too sizeable a number of individuals. One anthropologist has observed that "Jews are nearly always referred to in popular parlance as a 'race.' This is done not only by the so-called 'man in the street' but also by many scientists, medical men, philosophers, politicians, historians, and the members of many other professions." A. Montagu, *Man's Most Dangerous Myth*, at 353 (footnote omitted). Thus, there exists a real question about the breadth of the views at work in this case. If the majority insists that misperceptions be broad based for § 1982 to apply, plaintiffs should at least be given the opportunity to show the scope of the belief that they are members of a distinct race.

(App. 20a).

The Congregation fervently wishes that the respondents' racial perceptions of Jews were not shared by others, but the historical and contemporary record demonstrates that they are not alone. Neo-Nazi and Klan

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[15] In attempting to distinguish *Manzanares* v. *Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979), in which the court held that a Mexican-American could state a section 1981 claim, the Fourth Circuit observed that "we do not *find* the position of Jews in this society to be analogous to that of Mexican-Americans or others commonly considered to be non-whites" (App. 7a (emphasis added)). The court cited no evidence in support of its "finding" that Jews are not commonly considered to be non-whites.

groups openly embrace an ideology which includes racist bias against Jews; this racist bias, regrettably, is not an anomaly.[16] The respondents here, like the Nazis and Klan

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[16] For example, the National Socialist Party of America views itself as a successor to Hitler's National Socialist movement. The first "fundamental principle" of American National Socialism is "Acceptance of Adolf Hitler." H. Covington, *10 Fundamentals of National Socialism*, The New Order 3 (Mar. 1979). Also among its "fundamental principles" is belief in "The Jew as the Ultimate Enemy." The official party newspaper expresses this principle in the following terms:

> The single serious enemy facing the White man is the Jew. The Jews are not a religion, they are an Asiatic *race*, locked in mortal conflict with Aryan man which has lasted for millennia, and which will continue until one of the two combat peoples is extinct.

H. Covington, *10 Fundamentals of National Socialism*, The New Order 3 (Mar. 1979) (emphasis in original).

In perpetrating hate violence, neo-Nazis have identified Jews as targets because Jews are perceived as non-white. For example:

> [I]n Houston, Texas, in December, 1977, the local unit of the National Socialist White Workers Party, through its recorded telephone message, offered an award of $5,000 "for every non-white killed during an attack on a white person." Defending the award, Nazi spokesman Dennis Milem stated it was time "for an all-out war for whites against non-whites, and that includes Jews."

Anti-Defamation League of B'nai B'rith, 24 Facts 7 (Mar. 1978).

Neo-Nazi hate literature in the United States is rife with racist references to Jews. For example, *Aryan Nations*, the official publication of a neo-Nazi group of the same name, has exhorted its readers: "Aryans Awake! Jews are the Race of Satan!" *Aryan Nations*, No. 30, at 8 (R. Butler ed. 1983). The magazine explains the program of the Aryan Nations movement in the following manner:

> There is no hope for the White race, if it does not immediately come to the grim realization that the Jewish powers who presently rule over the Western nations desire and work toward the absolute destruction of White men everywhere. The Jews and their surrogates . . . try to force mongrelization of the White race, especially in Britain and America: from racial

whose symbols they appropriated, acted out of racial animus against Jews. The record does not contradict or even challenge that conclusion. As long as people commit acts of violence out of racism, the federal Civil Rights Acts which protect against racial discrimination are an essential remedy to protect victims and make them whole. Contrary to Judge Murnaghan's assumptions in his concurrence (App. 10a), such remedies are not readily available under state law. State criminal statutes generally—and criminal statutes in Maryland specifically—provide no compensation for the victims and depend to a large degree upon prosecutorial discretion. State tort and common law remedies largely ignore the racist character of the acts and do not provide for injunctive relief. Unlike a criminal prosecution for trespass or a generalized tort action for damages under state common law, a federal civil rights action tells the perpetrators that it is the racist character of the acts—and the resulting injury to individual dignity—that society deplores, not just damage to property. It is a reproach to our legal system that it should regard the racially-motivated desecration of Shaare Tefila's synagogue as no more than a garden variety trespass and that the penalty for writing "DEATH TO THE JUDE" and "IN, TAKE A SHOWER JEW" on the walls of a synagogue is no different from the penalty for writing ordinary graffiti on the side of an office building.[17]

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bastardization there can be no hope of return to genetic purity and vitality.

Aryan Nations, No. 32, at 7 (R. Butler ed. 1983).

[17] The inadequacy of state remedies is further illustrated by the record of criminal prosecutions of the respondents here. Six respondents were indicted for their acts on the night of November 1, 1982. Only two of eight counts in the indictments related directly to the synagogue desecration: one count for destruction of property and one count for conspiracy to commit malicious destruction of property. The prosecution entered a *nolle prosequi* against one of the respondents. Three pleaded guilty to single counts unrelated

Jews throughout this country need the protection of the federal Civil Rights Acts to redress acts of racial discrimination.[18] Anti-Semitic incidents are prevalent in the Fourth Circuit, as in other parts of the country, and are increasing in Montgomery County, Maryland, where Shaare Tefila is located.[19] In passing the Civil Rights

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to the synagogue desecration and received suspended sentences. One respondent pleaded guilty to two counts, including the count for conspiracy to commit malicious destruction of property, and received a sentence of three years with all but 120 days suspended. A single respondent was tried and convicted on the two counts relating to the synagogue desecration. He received three-year concurrent sentences on those counts.

[18] The Anti-Defamation League of B'nai B'rith reported 638 incidents of anti-Semitic vandalism against Jewish institutions and private Jewish homes and businesses in 34 states and the District of Columbia in 1985. Maryland ranks fifth in such incidents. Other indications of the seriousness of the problem include the violent actions of a neo-Nazi group called "The Order" and the activities of other organized anti-Jewish hate groups including neo-Nazi groups, the KKK, and the Posse Comitatus. *See* Anti-Defamation League of B'nai B'rith, *1985 Audit of Anti-Semitic Incidents* 1, 5 (1986); *Neo-Nazis Inspire White Supremacists,* Washington Post, Dec. 6, 1984, at A3, col. 1.

[19] The Montgomery County Maryland Human Relations Commission reports that 195 hate violence incidents (including harassment, vandalism, assault, arson and cross-burning) occurred in the County in 1985, compared with 151 such incidents in 1984. Jews were the target in 68 incidents in 1985 and 67 in 1984. In addition, 45 incidents have occurred in 1986 (through May 15, 1986), of which 23 were directed at Jews. Montgomery County [MD] Human Relations Commission, *Montgomery County Government Hate/Violence Incidents Fact Sheet* (May 15, 1986). *See also Local Anti-Semitic Acts More Violent,* Washington Post, Sept. 21, 1985, at B6, col. 1 ("Anti-Semitic incidents in affluent Montgomery County are getting more violent and account for about 75 percent of all reported racial violence in the county, officials said this week"); *Anti-Semitic Incidents Called More Violent,* Montgomery Journal, Sept. 19, 1985, at A5, col. 1. The incidents have included the desecration of a Jewish Community Center (with a three foot high swastika) and an elementary school (with 25 swastikas and the slogans "Hitler youth group" and "kikes must die"). A synagogue in neighboring

Acts, Congress intended to provide a remedy for victims of precisely this kind of vicious harassment. In order to give that assurance to a group which does suffer racial discrimination, this Court should review and reverse the Fourth Circuit's decision.

II. This Court Should Review the Fourth Circuit's Decision Because It Is in Conflict with a Recent Decision of the Third Circuit.

On March 3, 1986, just four days before the Fourth Circuit's decision in *Shaare Tefila*, the Third Circuit held that "ethnic Arabs may depend upon Section 1981 to remedy racial discrimination against them." *Al-Khazraji* v. *Saint Francis College*, 784 F.2d 505, 514 (3d Cir. 1986). Al-Khazraji had alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, sections 1981, 1983, 1985(3), 1986, and state law for alleged discrimination by Saint Francis College in denying him tenure. Saint Francis College moved for summary judgment and argued that an ethnic Arab is taxonomically a Caucasian and therefore "not a protected person under Section 1981 when he is presumably claiming other Caucasians or whites were improperly favored over him." *Al-Khazraji*, 784 F.2d at 514. The Third Circuit agreed with Al-Khazraji and concluded that "*McDonald* rejected the argument that Section 1981 is limited to the protection of nonwhites against racial discrimination . . . . The protection against racial discrimination thus extends beyond those who are taxonomically members of the Negro race. Appellant is therefore not prevented from invoking Section 1981 merely because he is taxonomically classified as a member of the Caucasian race." *Id.* at 515.

Prince George's County also was recently desecrated. Anti-Defamation League of B'nai B'rith, *1985 Audit of Anti-Semitic Incidents* 4 (1986); *Laurel Synagogue is Defaced*, Washington Post, Sept. 16, 1985, at D5, col. 4.

The Third Circuit then turned to the legislative history of the Civil Rights Act of 1866, and prior decisions of this Court, in an attempt to determine "how . . . to recognize the sort of discrimination proscribed by Section 1981." *Id.* (footnote omitted). The court concluded from the legislative history that "Congress did not intend to limit Section 1981 solely to those who could demonstrate that they had been discriminated against because they belonged to a particular group identified and described by anthropologists. When Congress referred in the statute to 'race,' it plainly did not intend thereby to refer courts to any particular scientific conception of the term." *Id.* at 516. The court reversed and remanded to give Al-Khazraji the opportunity to offer proof that the discrimination he alleged is racial discrimination prohibited by section 1981 because "where a plaintiff comes into federal court and claims that he has been discriminated against because of his race, we will not force him first to prove his pedigree." *Id.* at 517.

The law in the circuits now is that a Jew can never state a claim for racial discrimination under section 1982 while an Arab may prove a claim under section 1981 if he or she demonstrates that the discrimination was racial in character.[20] This is a tension between the circuits that should be resolved not only for the typical reasons that it fosters forum shopping and confusion in the district courts and other circuits, but because it irra-

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[20] Moreover, various circuits have divided on the question of whether Hispanics and other ethnic minorities must show that they are racially distinct in order to state a section 1981 or 1982 claim for race discrimination. *Compare Manzanares* v. *Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979) (reversing dismissal of section 1981 claim brought by Mexican-American who complained that discharge from employment was based on race) *with Shah* v. *Mt. Zion Hospital & Medical Center*, 642 F.2d 268, 272 (9th Cir. 1981) (claim of employment discrimination by East Indian was properly dismissed on summary judgment because he did not "present any factual support for the assertion that he is 'Black' ").

tionally elevates one group over another for purposes of access to the federal courts.

CONCLUSION

Judge Wilkinson recognized that the fact that Jews are *not* a separate race has afforded them no protection from some of the greatest horrors in history, which were inflicted in the belief that Jews are a distinct and inferior race:

> It is undeniable that the misguided view of the racial distinctiveness of Jews has led to atrocities of no less consequence than those generated by other fallacious beliefs about race. Though history is unfortunately replete with examples of repression of Jews as a people, one need not trace these problems through the ages to discern the consequences of distorted racial views about Jews, for it is during this century that their most terrible effects have been witnessed. Hitler was driven by the belief that Jews constituted a separate race that threatened his goal of racial purity. *See* G. Gilbert, *Nuremberg Diary* 43 (1947) (testimony of Julius Streicher). "The fact that the Nazi 'race' theories represented the most ludicrous and vicious mythology that had ever been perpetuated upon a people did not . . . prevent those myths from functioning as if they were perfectly true." A. Montagu, *Man's Most Dangerous Myth*, at 49. History teaches, then, that misperceptions about racial identity are no different in the misery and hatred they spread than misperceptions about the relevance of race.

(App. 15a-16a (footnote omitted)).

For all of the foregoing reasons, the Congregation respectfully seeks this Court's review of the decision of the Fourth Circuit.

Respectfully submitted,

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No. A-876

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

v.

JOHN WILLIAM COBB, *et al.*,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1544

SHAARE TEFILA CONGREGATION, individually, and on behalf of its members; RABBI MARTIN S. HALPERN; SHIRLEY ALTMAN; WILLIAM HARKAWAY; MARSHALL S. LEVIN; MAURICE POTOSKY and DR. JACOB TELLER,
Appellants,

and

AETNA CASUALTY & SURETY COMPANY,
Plaintiff,

versus

JOHN WILLIAM COBB; WILLIAM RANDALL HARRIS; THOMAS LLOYD HEINE; WILLIAM HESS; THOMAS JOSEPH HUNT, JR.; RAYMOND LEE JORDAN; DOMINIC QUEEN and MICHAEL DAVID REMER,
Appellees.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Norman P. Ramsey, District Judge—(C/A 84-880)

Argued: November 5, 1985 Decided: March 7, 1986

Before HALL, MURNAGHAN, and WILKINSON, Circuit Judges.

Patricia A. Brannan (William A. Bradford, Jr.; Daniel S. Cohen; Steven P. Hollman; P. Dustin Finney, Jr.; Hogan & Hartson; Irvin N. Shapell; Jewish Advocacy Center on brief) for Appellants; Deborah T. Garren (Robert B. Barnhouse; Piper & Marbury; Joseph M. Niland on brief) for Appellees.

HALL, Circuit Judge:

Shaare Tefila Congregation and individual representatives of the class comprised of its members and employees appeal from the district court's order dismissing their action against defendants.[1] Plaintiffs brought this action pursuant to 42 U.S.C. §§ 1981, 1982 and 1985(3) and the Maryland common law of trespass, nuisance, and intentional infliction of emotional distress. We affirm.

I.

Shaare Tefila Congregation is a Jewish community of approximately 500 member families, who assemble at their synagogue in Silver Spring, Maryland, in order to worship and engage in community activities. On the evening of November 2, 1982, members and employees of Shaare Tefila Congregation met at the synagogue for activities, including a board of directors' meeting. Marshall S. Levin, the Executive Director of Shaare Tefila Congregation, remained at the synagogue after the meeting. There, he received a telephone call from Dr. Jacob Teller, one of the board members, informing him that Teller's car had been spray-painted with a swastika while parked at the synagogue for the meeting. When Levin went outside to search for possible further damage, he discovered that the white outside walls of the synagogue had been spray-painted in red and black with large anti-Semitic slogans and symbols, which included the words

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[1] Defendants are private individuals who allegedly vandalized plaintiffs' synagogue.

"Death to the Jude," "In, Take a Shower Jew," "Toten Kamf Raband," and "Dead Jew," swastikas, a skull and cross bones, and Ku Klux Klan symbols.

On March 16, 1984, Shaare Tefila Congregation and several of its members and employees (the "Congregation") filed this civil rights class action against defendants in federal district court. In its complaint, the Congregation alleged violations of 42 U.S.C. §§ 1981, 1982, and 1985(3) and the Maryland common law of trespass, nuisance, and intentional infliction of emotional distress.

Before the completion of discovery, one of the defendants filed a motion under Fed. R. Civ. P. 12(b)(1) and (6) to dismiss the complaint. The district court granted the motion. The Congregation's section 1981 claim, alleging that defendants' conduct deprived plaintiffs of the full and equal benefit of the laws, was dismissed on the ground that it did not involve any state action. *Shaare Tefila Congregation v. Cobb*, 606 F. Supp. 1504, 1506-07 (D. Md. 1985). The district court dismissed the Congregation's section 1982 claim after concluding that discrimination against Jews is not race discrimination within the meaning of the statute. *Id.* at 1507-09. The court refused to adopt the Congregation's position that the racial animus requirement of section 1982 is satisfied if defendants are motivated by a perception that plaintiffs are racially distinct, reasoning that such a position relies "entirely on the idiosyncracies of individual defendants." *Id.* at 1508.

In view of its dismissal of appellant's claims under sections 1981 and 1982, the district court also dismissed the Congregation's section 1985(3) claim insofar as it alleged a conspiracy to deprive appellant of rights under sections 1981 and 1982. *Id.* at 1509. The district court further held that neither the federal constitutional right to interstate travel nor the various state rights asserted by appellant could support a cause of action under section 1985(3). Specifically, the court found that appel-

lant's claim concerning the right to interstate travel was based on conclusory allegations and that section 1985(3) reaches only federal—not state—rights. *Id.* at 1509-10.

Because of its dismissal of all of the Congregation's federal claims, the district court also dismissed the pendent state claims. *Id.* at 1510. In addition, although the motion to dismiss was filed on behalf of only one defendant, the district court found that its rulings required dismissal of the entire action against all of the defendants. *Id.*

This appeal followed.

II.

On appeal, the Congregation contends that the district court erred in dismissing its claims under sections 1981, 1982, and 1985(3). We disagree.

Section 1981 provides, in pertinent part, as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

With respect to its section 1981 claim, the Congregation alleged in its complaint that "[d]efendants' desecration of the synagogue . . . deprived plaintiffs of the full and equal benefit of laws for the security of persons and property. Defendants' desecration . . . was motivated by racial prejudice in that defendants perceive plaintiffs as racially distinct because they are Jews."

The Congregation acknowledges on appeal that no state action was involved in defendants' acts. It maintains, however, that the district court erred in concluding that state action is required in order to bring a "full and equal benefit" action under section 1981. We, however, agree

with the Third Circuit's interpretation of the "full and equal benefit" clause of section 1981 and conclude that state action is required in order to assert a claim under that statute. *See Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978).

In *Mahone*, the Third Circuit distinguished the "full and equal benefit" clause of section 1981 from the "contracts" clause of that statute. It noted that the right "to make and enforce contracts" was by nature concerned with relationships between private parties, and a prohibition against race discrimination in the private sector was readily implied. On the other hand, the Third Circuit stated:

> The words "full and equal benefit of all *laws and proceedings* for the security of persons and property" (emphasis supplied) . . . suggest a concern with relations between the individual and the state, not between two individuals. The state, not the individual, is the sole source of law, and it is only the state acting through its agents, not the private individual, which is capable of denying to blacks the full and equal benefit of the law. Thus, while private discrimination may be implicated by the contract clause of section 1981, the concept of state action is implicit in the equal benefit clause.

Id. at 1029. Because appellant's section 1981 "full and equal benefit" claim does not involve any state action, we find that the district court did not err in dismissing that claim. Moreover, for the reasons discussed in the next section, we conclude that the requisite racial motivation to sustain a section 1981 claim was lacking.

III.

Next, the Congregation alleges that the district court erred in dismissing its section 1982 claim. Section 1982 states that "[a]ll citizens of the United States shall have

the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." Appellant's section 1982 claim, as stated in its complaint, was that "[d]efendants' desecration of the synagogue ... deprived plaintiffs of the right to hold real and personal property. Defendants' desecration of the synagogue was motivated by racial prejudice in that defendants perceive plaintiffs as racially distinct because they are Jews."

Appellant argues that the district court's dismissal of its section 1982 claim is erroneous as a matter of law because defendants' desecration of the synagogue had a racial character, was motivated by racial animus and, thus, is actionable under section 1982. The Congregation maintains that Jews are not members of a racially distinct group and do not wish to be so considered. It nevertheless argues that because defendants viewed Jews as a racially distinct group, defendants' acts constituted racial discrimination in violation of section 1982. In support of its argument, the Congregation relies upon the Tenth Circuit's decision in *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979). We reject appellant's contentions and find nothing in the statute, its legislative history, or subsequent case law which would lead us to conclude that section 1982 was intended to apply to situations in which a plaintiff is not a member of a racially distinct group but is merely *perceived* to be so by defendants. We conclude that *Manzanares* is, if correct at all, inapposite.

Manzanares involved a section 1981 action brought by a plaintiff of Mexican-American descent against his employer and labor union, alleging that he was discriminated against due to his race and/or national origin in that he was treated differently from Anglo-Americans. The Tenth Circuit concluded that "section 1981 is directed to racial discrimination primarily, but is not necessarily limited to the technical or restrictive meaning of 'race,'"

id. at 971, and held that the plaintiff's contentions were sufficient to state a claim under section 1981. Appellants urge us to extend the Tenth Circuit's reasoning here. We decline to do so. *Manzanares* did not hold that a defendant's mere perception of a plaintiff as racially distinct is sufficient to constitute racial discrimination in violation of section 1981. Instead, the Tenth Circuit emphasized that Mexican-Americans, as a group, are commonly treated differently from Anglo-Americans, as a group. We do not find the position of Jews in this society to be analogous to that of Mexican-Americans or others commonly considered to be non-whites.

Although we sympathize with appellant's position, we conclude that it cannot support a claim of racial discrimination solely on the basis of defendants' perception of Jews as being members of a racially distinct group. To allow otherwise would permit charges of racial discrimination to arise out of nothing more than the subjective, irrational perceptions of defendants. Such perceptions are not what section 1982 was intended to protect against. Because discrimination against Jews is not racial discrimination, and the Supreme Court has stated that section 1982 does not address discrimination on account of religion or national origin, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968), we find that the district court properly dismissed the Congregation's section 1982 claim.

IV.

Appellant's last contention is that the district court erred in dismissing its section 1985(3) conspiracy claim.[2]

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[2] Section 1985(3) provides in pertinent part, the following:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section,

In that claim, the Congregation alleged, *inter alia*, the following:

> By conspiring to and desecrating the synagogue . . . defendants conspired for the purpose of depriving, either directly or indirectly, the class of members of . . . [the] Congregation of the equal protection of the laws or of equal privileges and immunities under the laws, including, but not limited to, plaintiffs' federal constitutional right to travel, 42 U.S.C. §§ 1981 and 1982, . . . Maryland criminal laws prohibiting destruction of property and conspiracy to destroy property, and Maryland common law prohibiting trespass, nuisance and intentional infliction of emotional distress.

On appeal, the Congregation asserts that its section 1985(3) claim should not have been dismissed, because it stated valid causes of action under sections 1981 and 1982. In addition, appellant argues that the district court erred in holding that its complaint failed to support a cause of action under section 1985(3) based on its federal constitutional right to interstate travel. The Congregation maintains that from its allegations in the complaint as to the location of the synagogue, the residency of the synagogue's members, the conduct of the defendants, and the effect of that conduct on appellant, a finder of fact could conclude that the purpose and effect of defendants' conspiracy was to deprive congregants of their right to engage in interstate travel. Finally, the Congregation disputes the district court's conclusion that appellant did not state a section 1985(3) claim for violation of its rights under Maryland law. It asserts that

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if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

state law rights are appropriate rights upon which to base violations of section 1985(3).

The Congregation cannot base its section 1985(3) claim on sections 1981 and 1982, because, for the reasons discussed in the preceding sections of this opinion, it failed to state causes of action under those statutes. We reject appellant's remaining contentions as to its section 1985(3) claim upon the reasoning of the district court. *Shaare Tefila Congregation*, 606 F. Supp. at 1509-10.

V.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

MURNAGHAN Circuit Judge concurring:

Bearing in mind that hard cases pose the risk of making bad law the present controversy constitutes a hard case. The behavior of which the defendants stand accused was execrable. In also reaching the conclusion Judge Hall has expressed, I nevertheless steadfastly hope that, if the allegations are supported by proof, stern retribution under the laws of Maryland will be meted out to the defendants.

Yet the law is grounded on facts, not on misperceptions of fact. For persons of the ilk which the defendants, at the present posture of the case, are revealed to be to have the power to confer jurisdiction on the federal courts would, in all probability, lead to very regrettable consequences.

I think not only of Jews and the regrettable indignities they may well have suffered here at the hands of the defendants. I cannot say that my sympathies for the first time go out to them only because those sympathies have already gone out to the Jews long ago and on many occasions as bad as or far worse than the instant one.

My ethnic origins are principally Hibernian. On March 17, for one group of Irish hotheads and on July 12 for another (as well as other dates during the year), violence deriving from misperceptions, of Catholics on the one hand, or of Protestants on the other, as an inferior human sort or race has broken out, to my everlasting regret from time to time. Yet it will but contribute to disruption of our nation to accord such ill mannered and unreasoned fracases the dignity of status as civil rights controversies. They belong in the state courts, where justice, more immediate and more personalized, is likely to be at hand.

Accordingly, I concur in the conclusion that 42 U.S.C. §§ 1981, 1982 and 1985(3) do not afford a basis for bringing suit in the circumstances here involved.

WILKINSON, Circuit Judge, concurring in part, dissenting in part:

I cannot accept the majority's view that the civil rights statutes invoked here fail to protect against racial discrimination based on "nothing more than the subjective, irrational perceptions of defendants." *Ante* at 8. All racial prejudice is the result of subjective, irrational perceptions, which drain individuals of their dignity because of their perceived equivalence as members of a racial group. The Civil Rights Acts of 1866 and 1871 were enacted precisely to halt the spread of violence and hatred by those motivated by such perceptions, and plaintiffs in this case, no less than those in the usual racial discrimination case, have suffered the consequences of abhorrent notions concerning racial identity and its relevance. Rather than allowing ignorance and misperception to provide their own defense, I would find the erroneous but all too sincere view of defendants that Jews constitute a separate race worthy of humiliation and degradation sufficient to bring the claim within 42 U.S.C. §§ 1982 and 1985(3).[1]

I.

Because the majority opinion leaves the impression that the incident at issue here was an isolated event with only speculative racial overtones, it is necessary to examine the broader context in which the desecration of Shaare Tefila Synagogue occurred. The posture of this case, of course, requires that we take the allegations of the complaint as

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[1] I agree with the majority that the "full and equal benefit" clause of 42 U.S.C. § 1981 requires state action, and accordingly join in part II of its opinion. It should be noted, however, that my discussion of racial discrimination under § 1982 applies with equal force to § 1981 where other predicates for § 1931 coverage are established. I too would affirm the district court's conclusion that § 1985(3) actions may not be grounded solely in violations of state law. Because I disagree with the view that § 1982 does not apply, however, I would reinstate plaintiffs' § 1985(3) conspiracy claim to the extent it alleges a conspiracy to violate § 1982.

true and consider only the legal adequacy of the facts as alleged. Here, we find that defendants' activities on the evening of November 1, 1982 started when they gathered behind a Drug Fair store at a shopping center in Silver Spring, Maryland. While the eight defendants drank and talked, they spray painted the outside walls of the store with anti-Semitic slogans and symbols, including "Arian [sic] Brotherhood," "White Power," "KKK," an eagle with a swastika, and a Star of David with an arrow through it. Defendants also painted their initials on the Drug Fair wall.

During this time, one of the group suggested that "somebody should do that to a synagogue." Apparently heeding this suggestion, defendants proceeded toward the nearby grounds of Shaare Tefila Congregation. On their way, they painted a swastika on the car of synagogue member Jacob Teller, parked outside the synagogue. Defendants then entered the grounds of the synagogue and painted offensive symbols and slogans on the building similar to those painted at the Drug Fair. These included swastikas, a skull and crossbones, a burning cross, and the slogans "Dead Jew," "Death to the Jude," "Ku Klux Klan," and on a doorway the words "In, Take a Shower Jew." Also found on the building was the phrase "Toten Kamf Raban," apparently a reference to the Totenkopfverbände—"death head units" of Nazi concentration camp guards from 1936 through World War II. The skull and crossbones was the insignia of the Totenkopfverbände. As one would expect, these actions caused members of the congregation great emotional distress and fear.

The complaint alleges that the racial character of defendants' action is established by their perception "of plaintiffs as racially distinct because they are Jews," and the procedural posture of this case requires us to assume that defendants do indeed view Jews as racially distinct. This assumption is further supported by the nature of

the slogans and symbols painted on the synagogue and by the statements of defendants themselves. The paintings found on the synagogue align the defendants with both the Ku Klux Klan and the Nazis, two groups infamous for their persistence in the view that Jews constitute a separate and inferior race. *See infra*, at 17-19. Depositions of defendants reveal that they understood the message of these groups and ascribed to the validity of their racial theories. Defendant Heine, for example, understood that the Nazis wanted to develop a superior race, one distinct from the Jewish race. Defendant Hunt belived that the phrase "Dead Jew" would make a Jew uncomfortable because "[i]t's an insult to your race." Thus, there is no question on appeal that defendants considered Jews to be a racially distinct group.

II.

Without so much as a hint as to the affirmative reach of § 1982, the majority asserts *ipse dixit* that defendants' actions "are not what section 1982 was intended to protect against." *Ante* at 8. This conclusion cannot withstand analysis. Federal civil rights laws protect citizens from acts of discriminatory intent. The discrimination found here is no different in character or consequence from that found in every racial discrimination case. Misperception lies at the heart of prejudice, and the animus formed of such ignorance sows malice and hatred wherever it operates without restriction. By removing the restriction of federal laws, the majority allows racial motivations greater latitude to effect their intolerable aims. There is simply no good reason why we should interpret this statute to protect against some forms of racial animus but not others.

There is, of course, no question that the Civil Rights Act of 1866, the genesis of §§ 1981 and 1982, was aimed at the evil fostered by racially discriminatory animus. Though not intended to provide recovery for discrimina-

tion based on religion, *Runyan v. McCrary*, 427 U.S. 160, 167 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968), or national origin, *Jones*, 392 U.S. at 413,[2] these sections clearly prohibit "*all* racially motivated deprivations of the rights enumerated in the statute." *Id.* at 426 (emphasis in original). The focus on discriminatory intent is not unique to §§ 1981 and 1982, for the presence of such intent is sufficient to establish violations of other laws aimed at the eradication of racial prejudice. *See, e.g., International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977) (Title VII); *Washington v. Davis*, 426 U.S. 229, 238-42 (1976) (Fifth, Fourteenth Amendments); *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (42 U.S.C. § 1985(3)). The effort to eliminate racially motivated actions, moreover, is not to be obstructed by narrow interpretations. The laws at issue here offer protection to "all persons" (§ 1981) and "all citizens" (§ 1982), and "establish[ed] in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 296 (1976) (holding § 1981 available to whites). Put simply, the laws established the right of every person to be free of enumerated deprivations motivated by racial animus.

The focus on the subjective intent of the actor reflects the reality that discrimination and prejudice is grounded in erroneous perceptions. In the more familiar case, racial discrimination is based on the misperception of the relevance of racial identity. Bigots are motivated by the belief that those of another race are inferior and hence

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[2] The Supreme Court has interpreted § 1981 to prohibit discrimination due to alienage, *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 419-20 (1948), but the extent of this protection is unclear. *See* Note, *National Origin Discrimination Under Section 1981*, 51 Fordham L. Rev. 919, 922-23 & note 28 (1983).

worthy of physical, mental and social repression. *See*, G. Myrdal, *An American Dilemma* 97-106 (1944). Broad, stereotypical assumptions about race have always formed the basis for both private and official acts of prejudice. One would think it preposterous to require that these beliefs be objectively true before federal law provides protection. To the contrary, it is precisely because such beliefs are false and reprehensible that federal civil rights laws were enacted. These laws provide redress for the harms suffered by misperceptions about the relevance of race as a basis for action in our society.

Plaintiffs here were confronted not only with these misperceptions about the relevance of racial identity but also with the misperception that Jews are a distinct and inferior race. The evil visited upon them was thus a dual one. It is, of course, clear to this court, the district court, and counsel that Jews are not, under any legitimate view, a distinct race, but are in fact members of a religious community with a rich cultural heritage. *See* A. Montague, *Man's Most Dangerous Myth: The Fallacy of Race* 353-77 (5th ed. 1974). Yet the majority finds that the misperceptions at work here deprive the claim of the "racial character," *Georgia v. Rachel*, 384 U.S. 780, 791 (1966), necessary to bring it within § 1982. This conclusion must rest upon the view that the racial fallacies here are so different from those routinely prohibited by federal law as to fall outside the scope of it. I fail to see any relevant distinction between the racial attitudes that prompted defendants' actions and those at work in actions clearly within the scope of § 1982.

It is undeniable that the misguided view of the racial distinctiveness of Jews has led to atrocities of no less consequence than those generated by other fallacious beliefs about race. Though history is unfortunately replete with examples of repression of Jews as a people, one need not trace these problems through the ages to discern the consequences of distorted racial views about Jews, for it

is during this century that their most terrible effects have been witnessed. Hitler was driven by the belief that Jews constituted a separate race that threatened his goal of racial purity. *See*, G. Gilbert, *Nuremberg Diary* 43 (1947) (testimony of Julius Streicher). "The fact that the Nazi 'race' theories represented the most ludicrous and vicious mythology that had ever been perpetuated upon a people did not . . . prevent those myths from functioning as if they were perfectly true." A. Montagu, *Man's Most Dangerous Myth*, at 49. History teaches, then, that misperceptions about racial identity are no different in the misery and hatred they spread than misperceptions about the relevance of race.[3]

Nor is the danger of warped racial classification of Jews simply a matter of history. Neo-Nazi groups in the United States make no effort to hide their racist heritage or their ultimate goals. The National Socialist Party of America, for example, has proclaimed among its fundamental principles "acceptance of Adolf Hitler" and "the Jew as the Ultimate Enemy." *The New Order*, March 1979, at 3. These principles are expressed in explicitly racist terms: "The single serious enemy facing the White man is the Jew. The Jews are not a religion, they are an asiatic *race*, locked in mortal conflict with Aryan man which has lasted for millenia, and which will continue until one of the two combat peoples are extinct." *Id.* (em-

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[3] There can be no question that the Nazi theory and practice was racial. "[T]he Nazi attitude and discrimination against the Jews was not founded upon their religious practices; it did not cease upon religious conversion. Indeed, it even manifested itself in hunting down and 're-judaizing' assimilated Christians of Jewish extraction. Nor was this discrimination based upon national origin, since Jews of impeccable German ancestry were equally subject to the atrocities visited upon French, Polish, Danish, and Russian Jews. The Nazi discrimination against Jews was racial in that the Nazis defined the Jews as separate from their 'Aryan' race and maintained that Jews were a physically distinct people." Greenfield & Kates *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 Cal. L. Rev. 662, 677-78 (1975).

phasis in original). A group called Aryan Nations, in a publication of the same name, has implored its readers: "Aryans Awake! Jews are the Race of Satan!" *Aryan Nations*, No. 30 (1979) at 8. The racist view of Jews is also a major tenet of the Ku Klux Klan. An expert on the Klan, in an affidavit prepared for this litigation, noted that "a prevalent belief among the various Ku Klux Klan groups is that Jewish people are racially distinct from whites."

These views, like those of the Nazis, have resulted in numerous instances of violence against Jewish citizens. The facts of this case, unfortunately, are not isolated but instead representative of such incidents. In 1985 alone there were, in the estimate of one organization, 638 incidents of anti-Semitic vandalism against Jewish institutions, private Jewish homes, and Jewish businesses in the United States. Anti-Defamation League of B'nai B'rith, *1985 Annual Audit of Anti-Semitic Incidents* 1 (1986). Anti-Semitic physical assaults against Jews, and anti-Semitic threats and harrassment of Jewish institutions reportedly totaled 306. *Id.* at 2. Even were such events less prevalent, it would not lessen the sufferings of those subjected to them.

Of course, not every wrong against a Jewish citizen would be actionable under the civil rights laws. Here, however, we deal with the adherents of organizations whose aims are avowedly racial. It is clear that this case, like every case of racial discrimination, is the result of racial misperceptions. These misperceptions, moreover, result from the same catalyst for fear and violence that caused Congress to enact the Civil Rights Acts of 1866 and 1871. Defendants appropriate the very symbols of the Ku Klux Klan, the organization that visited the most virulent brand of racial violence in the Reconstruction era. In acting against it, Congress proclaimed the right of "all persons" to be free of "all racially motivated deprivations of the rights enumerated in the statute." *Jones*,

392 U.S. at 426. The majority now denies that right to plaintiffs by allowing defendants' misperceptions and ignorance to serve as a defense to their actions.

III.

The failure to allow this claim under § 1982 is not only inconsistent with the purpose of the statutory scheme, but also saddles the courts with the difficult and inappropriate burden of delineating racial distinctions in a context where they are irrelevant and unnecessary. The majority, apparently fearful that § 1982 actions might rest "entirely on the idiosyncracies of individual defendants," *ante* at 4, rejects the racial nature of the actions here because the victims did not actually belong to the distinct racial class in which defendants placed them. This approach, I presume, requires courts to determine by some more objective criteria whether an individual is a member of a distinct race before the Civil Rights Act of 1866 may apply. Yet the majority offers little guidance about how courts should undertake the troubling task it requires. Careful consideration of the burden imposed by the majority reveals significant deficiencies in the approach it establishes.

It is unrealistic to expect that a biological or anthropological perspective on the question of race will help courts to determine those protected under the majority's approach. The scientific concept of "race" is anything but definite. As one court has noted, scientists generally agree that "[t]he notion of race is a taxonomic device [that] exists in the human mind and not as a division in the objective universe." *Ortiz v. Bank of America*, 547 F. Supp. 550, 565 (E.D.Cal. 1982). *See* M. Banton & J. Harwood, *The Race Concept* 43-60 (1975); F. Livingstone, *On the Nonexistence of Human Races* in *The Concept of Race* (A. Montagu, ed. 1964). Scientists engaged in racial classification recognize that the choice of characteristics used to determine racial groups is arbitrary

and depends upon the reason for classification rather than objective reality. *See, Ortiz*, 547 F.Supp. at 565-66 and sources cited; Lundsgaarde, *Racial and Ethnic Classifications: An Appraisal of the Role of Anthropology in the Lawmaking Process*, 10 Hous. L. Rev. 641, 648-49 and note 23 (1973). Moreover, racial classifications are dynamic and subject to constant re-examination. *See* A. Montagu, *Statement on Race* 46-50 (3d ed. 1972). In short, the inexact and unstable nature of scientific racial classification makes the tool all too treacherous for a court seeking to determine the precise coverage of federal law.

More significantly, the scientific debate over the meaning of race is simply irrelevant to the determination of the protection of a statute addressed to a social phenomenon. As this case demonstrates, it is not scientifically authenticated views but rather distorted social perceptions that lie at the root of racial violence. "The social definition and not the biological facts actually determines the status of an individual and his place in interracial relations. . . . [T]he scientific concept of race is *totally inapplicable at the very spots where we recognize 'race problems.'*" G. Myrdal, *supra*, at 115. (emphasis in original). We cannot be blind to the fact that "[t]o most people, a race is any group of people whom they choose to describe as a race." UNESCO, *Statement on Race* (1950) in A. Montagu, *Statement on Race* at 8. In construing statutes designed to eliminate racial prejudice, we must confront the reality that the perceptions of individuals, rather than the measurements of science, define the scope of racial discrimination. To limit § 1982 to discrimination against scientifically established racial groups would deprive the remedy of its force in an artificial and disingenuous manner.

Perhaps in recognition of the inadequacies of a scientific approach to the scope of § 1982, several courts have employed a "common perception" test to determine the coverage of the statute. *See, e.g., Ramos v. Flagship*

International, Inc., 612 F.Supp. 148, 151 (E.D.N.Y. 1985); *Banker v. Time Chemical, Inc.*, 579 F.Supp. 1183, 1186 (N.D.Ill. 1983); *Budinsky v. Corning Glass Works*, 425 F.Supp. 786, 788 (W.D. Pa. 1977). The majority implies that § 1982 might apply here if the misperception at work were a common or widely-shared view, but rejects the application of this test because "the position of Jews in this society [is not] analogous to that of Mexican-Americans or others commonly considered to be non-white." *Ante* at 8. Thus, while recognizing the role of misperceptions in racial discrimination, the majority apparently requires that they be broadly held for § 1982 to apply. There are several reasons why any such approach must be rejected on these facts.

First, the majority's assertion of the common perception of Jews is totally unsupported. The level and persistence of racial violence against Jews, as discussed above, certainly suggests that the misperceptions here are shared by too sizeable a number of individuals. One anthropologist has observed that "Jews are nearly always referred to in popular parlance as a 'race.' This is done not only by the so-called 'man in the street' but also by many scientists, medical men, philosophers, politicians, historians, and the members of many other professions." A. Montagu, *Man's Most Dangerous Myth*, at 353 (footnote omitted). Thus, there exists a real question about the breadth of the views at work in this case. If the majority insists that misperceptions be broad based for § 1982 to apply, plaintiffs should at least be given the opportunity to show the scope of the belief that they are members of a distinct race.

In any event, the scope and breadth of illegitimate views is not controlling where, as here, plaintiffs seek to demonstrate that these particular defendants held, and were motivated by, racial misperceptions. The very purpose of the Civil Rights Acts was to ensure that the most bigoted people are not permitted to translate their im-

pulses into tangible harms. Protection against the acts of racial prejudice is necessary whether the views are widely held or idiosyncratic. Where, as here, plaintiffs are prepared to show defendants were motivated by racial beliefs, however misguided, there is no reason for a court to require more. Many courts have recognized that proof of racial motivation, without more, is sufficient to bring an action within § 1981 or § 1982. *See, e.g., Khawaja v. Wyatt*, 494 F.Supp. 302, 304 (W.D.N.Y. 1980); *Apodaca v. General Electric Co.*, 445 F.Supp. 821, 823-24 (D.N.M. 1978). The fact that courts may sometimes find it convenient to look to common perceptions to determine racial status should not preclude plaintiffs from showing that defendants here operated on the basis of racial misperceptions, however, misguided or idiosyncratic.

Permitting the subjective belief of defendants to give a claim the "racial character" necessary to bring it within the civil rights statutes thus not only ensures adequate coverage but also avoids in many cases the difficult and troubling task of drawing racial lines. Even if courts were well equipped to make racial determinations without engaging in "precisely the kind of stereotyping which the civil rights statutes were designed to prevent," *Khawaja*, 494 F.Supp. at 305 n.1, the undertaking presents a potential for continued harm and prejudice so great that it should be avoided wherever possible. It is an understatement to note that attempts to place individuals in distinct racial groups frequently serve only to facilitate continued discrimination and postpone the day when all individuals will be addressed as such. It is regrettable that the majority has adopted an approach that demands judicial draftsmanship of an officially recognized and protected list of races.[4] It is doubly regret-

[4] It is only the majority's approach that establishes a need for racial distinctions here. In *McDonald v. Santa Fe Trial Transportation Co.*, 427 U.S. 273, 295 (1976), the Supreme Court examined the legislative history of the Civil Rights Act of 1866 and rejected

table that it adopts this approach in a case where the racial nature of the acts is clear and compelling.

IV.

Finally, it simply will not do to say that plaintiffs are limited to some unidentified state law remedy. The assertion that this controversy "belong[s] in the state courts," *ante* at 12, begs the question of whether federal law contemplates protection here. Moreover, exclusive reliance on state remedies is particularly inapposite in the context of civil rights, a persistent concern of federal legislation. In enacting the Civil Rights Act of 1866, Congress intended at the very least to supplement state laws. *See Jones*, 392 U.S. at 426-36. The Civil Rights Act of 1871, also known as the Ku Klux Klan Act, was designed precisely to provide a federal remedy for activities such as those found in this case. *See, Griffin v. Breckenridge*, 403 U.S. 88 (1971). To now relegate these matters exclusively to state law simply disregards the nature and scope of federal remedies provided by Congress and the unique capacity of federal law to voice a strong and uniform commitment to the eradication of discrimination in our midst.

V.

I would thus reverse the judgment of the district court and find plaintiffs' complaint sufficient to state a cause of action under §§ 1982 and 1985(3). Section 1982 guarantees "all citizens of the United States" an equal right "to hold . . . real and personal property." Section 1985(3) protects them against racially motivated conspiracies to deprive them of the equal protection of federal laws.

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the view that the act applied only to nonwhites. There is thus no need to draw racial lines to determine those who are potential beneficiaries of the protection offered by § 1982. This task is imposed only by the majority's requirement that plaintiffs demonstrate the reality of the racial class in which defendants place them.

As the property, indeed the place of worship, of this community was desecrated for reasons and with symbols that resorted unabashedly to race, I would hold the congregation of Shaare Tefila Synagogue entitled to the protection of our civil rights laws. To do otherwise is to blind ourselves as a nation to the real nature of race prejudice, and to leave American citizens open to the depredations of racial violence—the very acts against which Congress more than a century ago had sought to protect them.

APPENDIX B

IN THE UNITED STATES OF AMERICA FOR THE DISTRICT OF MARYLAND

Civil Action No. R-84-880

SHAARE TEFILA CONGREGATION, *et al.*,
Plaintiffs

v.

JOHN WILLIAM COBB, *et al.*,
Defendants

MEMORANDUM AND ORDER

The Shaare Tefila Congregation, individually and on behalf of its members, instituted this civil action against eight defendants for alleged violations of federal and state law arising from defendants' desecration of plaintiffs' synagogue. Plaintiffs base their claims on federal civil rights statutes 42 U.S.C. §§ 1981, 1982 and 1985 (3), and on Maryland common law of trespass, nuisance and intentional infliction of emotional distress.

Presently pending before the Court is defendant Michael David Remer's motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(1) and (6). Plaintiffs filed a response in opposition to the motion and defendant has replied thereto.[1] Oral argument is unnecessary and the Court rules pursuant to Local Rule 6 (D. Md. 1984).

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[1] Plaintiffs in their opposition submit materials outside the pleadings (affidavits and deposition transcripts) and thereby subject the motion to treatment as one for summary judgment. Fed.R. Civ.P. 12(b). Given that extra-pleading materials are inappropriate in a motion based, as this one is in part, on Rule 12(b)(1), and

The grant of a motion to dismiss pursuant to Rule 12 (b) (6) is appropriate only when it appears beyond doubt that plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In ruling upon the pending motions to dismiss, the Court must view the complaint in the light most favorable to plaintiffs and resolve every doubt in their behalf. *See* Wright and Miller, *Federal Practice and Procedure: Civil § 1357* (1969) and cases cited therein. The plaintiffs' allegations are to be taken as true for the purposes of ruling upon the motion. *See id.* and cases cited therein. *See also Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969). Moreover, any inference that may reasonably be drawn or construed from plaintiffs' complaint shall be considered together with the allegations of fact. *Murray v. City of Milford, Connecticut*, 380 F.2d 468, 470 (2d Cir. 1967); *L.S. Good & Co. v. H. Daraff & Sons, Inc.*, 263 F.Supp. 635, 644 (N.D. W.Va. 1967).

A motion to dismiss pursuant to Fed.R.Civ.P. 12(b) (1) raises the question of whether a court has subject matter jurisdiction over a proceeding. In ruling upon this motion, the complaint will be construed broadly and liberally, in conformity with Federal Rule of Civil Procedure 8(f). *See, e.g., Bachowski v. Brennan*, 502 F.2d 79, 83 n. 4 (3d Cir. 1974), *rev'd on other grounds sub nom., Dunlop v. Bachowski*, 421 U.S. 560 (1975); *Duffield v. Memorial Hospital Ass'n of Charleston*, 361 F.Supp. 398, 400 (S.D. W.Va. 1973), *aff'd on other grounds sub nom., Duffield v. Charleston Area Medical Center*, 503 F.2d 512 (4th Cir. 1974). *See generally* Wright & Miller, *Federal Practice and Procedure*: Civil § 1350 (1969) and cases cited therein. Where the com-

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finding that the materials submitted will not facilitate the disposition of this action, the Court elects to exclude the materials and consider the motion as one for dismissal. *See* Wright & Miller, *Federal Practice and Procedure:* Civil § 1366 (1969).

plaint's jurisdictional allegations are complete, uncontradicted, and sufficient, the Court ordinarily must overrule a motion directed only at the language of the complaint. *See, e.g., Seaboard Finance Co. v. Martin*, 244 F.2d 329 (5th Cir. 1957). However, the pleading will be read as a whole, with any relevant specific allegations found in the body of the complaint taking precedence over the formal jurisdictional allegation therein, and all uncontroverted factual allegations will be accepted as true. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Gibbs v. Buck*, 307 U.S. 66 (1939). The plaintiff ordinarily bears the burden of proof on a Rule 12(b)(1) motion. *See, e.g., Thomson v. Gaskill*, 315 U.S. 442 (1942); *Gibbs v. Buck*, 307 U.S. 66 (1939); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936). Where the complaint's invocation of subject matter jurisdiction is based on a federal question, the plaintiff need only show that he had alleged a claim under federal law and that the claim is not frivolous. *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962); *Bell v. Hood*, 327 U.S. 678 (1946). The Court must weigh the merits of what is presented in a Rule 12(b)(1) motion. *See Peterson Systems, Inc. v. Morgan*, 224 F.Supp. 957 (W.D. Pa. 1963).

Count I: 42 U.S.C. § 1981

The first count of the complaint alleges that the desecration of plaintiffs' synagogue deprived the congregation of the full and equal benefit of laws for the security of persons and property under 42 U.S.C. § 1981. That statute provides in pertinent part as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .

Plaintiffs further allege in Count I that the defendants' conduct was "motivated by racial prejudice in that the defendants perceive plaintiffs as racially distinct because they are Jews . . ."

Defendant raises two arguments in support of dismissal of Count I. First, he contends that despite the allegations of racial animus in the pleadings, the essence of plaintiffs' claim is religious rather than racial discrimination, and as such it is not cognizable under § 1981. Second, defendant contends that state action is a required element of any claim under the full and equal benefit clause of the statute; because state action has not been alleged here dismissal is appropriate. The Court finds dismissal appropriate on the ground of state action, and therefore does not reach defendant's first argument for the purposes of Count I.[2]

Plaintiffs do not assert that any state action is involved in the instant case. Rather, they contend that state action is not required for a claim under the full and equal benefits clause, relying on *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). The Supreme Court held in *Jones* that 42 U.S.C. § 1982 was intended to prohibit private acts of discrimination which violate property rights. Plaintiffs argue that the same principles relied upon in *Jones* have been and should in this instance be applied to the full and equal benefits clause of § 1981.

The *Jones* holding has been applied to interpret the contract clause of § 1981 as prohibiting private acts of discrimination. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Runyon v. McCrary*, 427 U.S. 160 (1976). Some courts have indeed extended the holding even further to find, as plaintiffs' urge here, that the full and equal benefit clause of § 1981 also prohibits private acts of discrimination. *See, e.g., Central Presby-*

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[2] Defendant raises a similar argument concerning the true nature of plaintiffs' claim in relation to Count II of the complaint. *See infra.*

terian Church v. Black Liberation Front, 303 F.Supp. 894, 901 (E.D. Mo. 1969). This is by no means a universal interpretation, however. Other courts have noted a distinction between the contract and full and equal benefit clauses of § 1981, finding the concept of state action to be implicit in the latter:

> The words 'full and equal benefit of all laws and proceedings for the security of persons and property' . . . suggests a concern with relations between the individual and the state, not between two individuals. The state, not the individual, is the sole source of law, and it is only the state acting through its agents, not the private individual, which is capable of denying to blacks the full and equal benefit of the law. Thus, while private discrimination may be implicated by the contract clause of section 1981, the concept of state action is implicit in the equal benefit clause.

Mahone v. Waddle, 564 F.2d 1018, 1029 (3rd Cir. 1977), *cert. denied*, 438 U.S. 904 (1979).

The Third Circuit's interpretation of the full and equal benefits clause in *Mahone* was recently adopted by the U.S. District Court for the Eastern District of Virginia. In *Eggleston v. Prince Edward Volunteer Rescue Squad, Inc.*, 569 F.Supp. 1344 (E.D. Va. 1983), *aff'd*, 742 F.2d 1448 (4th Cir. 1984), the court granted summary judgment against the plaintiff's § 1981 action based on expulsion from a private rescue squad, finding no basis for a claim under the contract clause and no state action to support a claim under the full and equal benefit clause. 569 F.Supp. at 1353. This Court is in full agreement with the reasoning expressed in *Mahone* and adopted in *Eggleston* which distinguishes between the contract and equal benefit clauses for the purposes of state action. In the instant case there does not exist, nor do plaintiffs assert, any basis for a claim under the contract clause. Nor does there exist, and plaintiffs again do not assert, state action to support a claim under the full and equal benefit

clause. Dismissal is accordingly proper as to Count I of the complaint

Count II: 42 U.S.C. § 1982

The second count of the complaint alleges that defendants' desecration of the synagogue deprived plaintiffs of the right to hold real and personal property in violation of 42 U.S.C. § 1982. That statute provides as follows:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Plaintiffs again specifically allege in this Count that the defendants' conduct was "motivated by racial prejudice in that defendants perceive plaintiffs as racially distinct because they are Jews."

Defendants argue in support of dismissal of Count II that despite the "pleading artifice" by which plaintiffs attempt to assert race discrimination as the basis for their claim, the claim is nevertheless one of religious discrimination to which § 1982 does not apply. Plaintiffs argue in response that by specifically alleging that defendants' acts were motivated by racial animus they have in fact stated a claim for race discrimination cognizable under § 1982.

42 U.S.C. § 1982, along with § 1981, had its origin in the first section of the Civil Rights Act of 1866. *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431, 439 (1973). That Act was intended to protect a "limited category of rights, specifically defined in terms of racial equality." *Georgia v. Rachel*, 384 U.S. 780, 791 (1965). Not surprisingly, then, § 1982 has been held to apply solely to racial rather than to other types of discrimination. *Jones v. Alfred H. Mayer Co., supra* at 413 (1967). Moreover, the Supreme Court has specifically noted that the statute does not address itself to discrimination based on religion. *Id.*

Plaintiffs in defending their cause of action under § 1982 do not argue for a broad interpretation of the statute such as would protect against discrimination based on religion. Nor do they ask for judicial recognition of a Jewish racial identity in order that the statute be applicable here. Rather, plaintiffs argue that race discrimination for the purposes of § 1982 should be determined by the subjective perceptions of the discriminator: whatever the reality may be, because it is alleged that the defendants in this case *perceive* Jews to be a separate race and were motivated by racial animus, a viable cause of action exists.

The Court is unwilling to adopt an interpretation which relies so entirely on the idiosyncracies of individual defendants in civil rights cases. As defendant notes, such an approach would have the practical effect of extending § 1981 and § 1982 to apply to any group, however defined, merely by virtue of alleging that an individual defendant perceived the group as racially inferior, however irrational that perception might be. Moreover, the suggested approach is at odds with the language of decisions in this district concerning the scope of § 1981, which is clearly applicable to § 1982 as well. In *Martinez v. Hazelton Research Animals*, 430 F.Supp. 186 (D. Md. 1977), Judge Murray in deciding whether a discrimination claim by a Hispanic stated a proper cause of action under § 1981 specifically noted that some Hispanic individuals "may suffer discrimination closely akin to that experienced by members of the black race," but found that the plaintiff had not "sufficiently alleged racial background of the plaintiff in order to support an allegation of racial discrimination" under the statute. *Id.* at 187-88. Clearly it was the "racial background of the plaintiff" rather than the racial perceptions of the defendant, that the court found determinative. Judge Miller in *Lopez v. Sears, Roebuck and Co.*, 493 F.Supp. 801 (D. Md. 1980) adopted the above language from *Martinez* but found that in his case the plaintiff had "clearly stated that the

alleged discrimination is based both on nationality (Hispanic) and race (brown)." 493 F.Supp. at 807. Again, it is, to use Judge Murray's term, the "racial background" of the plaintiff ("race (brown)") that was found to support a cause of action under the statute. Applying this principle to the instant case, the Court finds that plaintiffs' allegation that defendants perceive them as racially distinct fails to establish a cause of action under § 1982.

The Court is sympathetic to plaintiffs' outrage and sorrow over the desecration of their place of worship, and recognizes the history of discrimination against Jews which is so eloquently described in plaintiffs' brief. Nevertheless, as plaintiffs themselves affirm, Jews do not constitute a distinct or recognizable "race" and are not commonly identified as such. Distorted beliefs of certain deviant groups to the contrary, the Court holds that discrimination against Jews is not race discrimination within the meaning of the statutes in question. *See Budinsky v. Corning Glass Works*, 425 F.Supp. 789 (W.D. Pa. 1977) (persons of Slavic, Italian or Jewish origin "are not so commonly identified as 'races' nor so frequently subject to that 'racial' discrimination which is the specific and exclusive target of § 1981"); *Wald v. International Brotherhood of Teamsters*, 24 FEP Cases 616, 619 (C.D. Ca. 1980) "[T]he weight of authority supports the view that claims of discrimination against Jews do not state claims under § 1981"). *But see Marlowe v. Fisher Body Division*, 11 FEP Cases 1357 (C.D. Mich. 1975) (in certain contexts discrimination against Jewish persons could be the equivalent of race discrimination under § 1981).

Count III: 42 U.S.C. § 1985(3):

The third count of the complaint alleges that in violation of 42 U.S.C. § 1985(3) the defendants conspired to deprive plaintiffs of equal protection of the laws or of equal privileges and immunities under the laws, including but not limited to the right to travel, the right to assemble and worship, and rights protected by 42 U.S.C.

§ 1981 and § 1982, Maryland criminal laws against destruction of proper[illegible]d Maryland common law against trespass, nuisance and intentional infliction of emotional distress. In view of the Court's dismissal of Counts I and II, the claim of conspiracy to deprive plaintiffs of rights under 42 U.S.C. § 1981 and § 1982 must also be dismissed. In addition, plaintiffs no longer assert the right to assemble and worship as an element of Count III, apparently conceding that a claim under § 1985(3) as applied to First Amendment rights fails in the absence of state action. *United Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott*, —— U.S. ——, 77 L.Ed.2d 1049 (July 1983). The Court will accordingly consider plaintiffs' § 1985 claim only as it applies to the federal right to travel and the various state rights plaintiff has asserted.

Right to Travel:

Nowhere in the complaint do plaintiffs make specific factual allegations that defendants interfered with their right to travel. Plaintiffs argue, however, that from their allegations as to the location of the synagogue and its members, the conduct of the defendants and the effect of that conduct on plaintiffs the finder of fact could conclude that the purpose and effect of the conspiracy was infringement of interstate travel. The Court finds this argument much too attenuated to support a cause of action under § 1985(3).

Certainly plaintiffs' conclusory allegation in Count III that defendants conspired for the purpose of depriving plaintiffs of their federal constitutional right to travel is insufficient to state a cause of action under § 1985. *Greene v. JHU*, 469 F.Supp. 187, 198 (D.Md. 1979). Nor does the sum of the other allegations specified by plaintiffs support such a claim. The Court finds this case to be easily distinguished from *Griffin v. Breckenridge*, 403 U.S. 88 (1971), upon which plaintiffs rely. In *Griffin* the

Supreme Court reversed an order dismissing a § 1985 complaint, on the ground that under the allegations presented it was open to the plaintiffs to prove at trial that defendants conspired to deprive them of their right to travel. The complaint in *Griffin* specifically alleged that plaintiffs were traveling upon federal, state and local highways in and about several counties, one of which was located on a state border; that defendants conspired to block plaintiffs' passage on those public highways and that pursuant to the conspiracy defendants in fact drove into the path of plaintiffs' vehicle and physically blocked its passage. In the instant case, by contrast, plaintiffs fail to allege any actual interference with their right to travel. Nor is there any support in the pleadings for the inference that defendants conspired to interfere with this right. Plaintiffs' claim under § 1985(3) is accordingly dismissed insofar as it concerns plaintiffs' right to travel.

Rights Under Maryland Law:

Plaintiffs argue that state as well as federal rights are protected under § 1985(3), citing *Life Insurance Co. of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979). The Court is persuaded, however, that the statute is properly interpreted to reach only federal constitutional and statutory rights. Subsequent to the Ninth Circuit's holding in *Reichardt* the Supreme Court described § 1985(3) as "providing a civil cause action when some otherwise defined *federal* right . . . is breached by a conspiracy . . .". *Great American Federal Savings and Loan v. Navotny*, 442 U.S. 366, 376 (1979) (emphasis added). The limitation of § 1985(3) to rights guaranteed by federal law or the Constitution has been clearly asserted by the Fourth Circuit as well. *McNutt v. Duke Precision Dental and Orthodontic Labs, Inc.*, 698 F.2d 676, 680 (4th Cir. 1983). Accordingly, the claim under § 1985(3) must be dismissed insofar as it concerns the various state rights asserted.

Plaintiffs have failed to state a cause of action on any of the purported bases under § 1985(3). Count III of the complaint must accordingly be dismissed.

Counts IV-VI: State Law Claims

The remaining counts of the complaint allege violations of Maryland statutory and common law. Given the Court's dismissal of all federal claims, the pendent state claims must also be dismissed. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

Although the motion to dismiss was filed on behalf of only one defendant it is obvious from the rulings contained herein that dismissal is appropriate as to the entire case against all defendants. Accordingly, for the reasons stated herein, it is this 22nd day of April, 1985, by the United States District Court for the District of Maryland,

ORDERED:

1. That defendant Remer's motion to dismiss is GRANTED; and,

2. That the action is DISMISSED as to all defendants; and,

3. That the Clerk of the Court shall mail copies of this Memorandum and Order to all counsel of record.

/s/ Norman P. Ramsey
NORMAN P. RAMSEY
United States District Judge

IN THE UNITED STATES OF AMERICA
FOR THE DISTRICT OF MARYLAND

Civil Action No. R-84-880

SHAARE TEFILA CONGREGATION, *et al.*,
Plaintiffs

v.

JOHN WILLIAM COBB, *et al.*,
Defendants

JUDGMENT

In accordance with the Memorandum and Order dated April 22nd, 1985, and filed in the above entitled case, it is

ORDERED and ADJUDGED:

That judgment is hereby entered in favor of the defendants and against the plaintiff.

/s/ Norman P. Ramsey
NORMAN P. RAMSEY
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

March 7, 1986

TO: William A. Bradford, Jr., Esq.
Patricia A. Brannan, Esq.
Daniel S. Cohen, Esq.
Steven P. Hollman, Esq.
P. Dustin Finney, Jr., Esq.
Paul W. Nolan, Esq.
Robert Barnhouse, Esq.
Deborah T. Garren, Esq.
Irvin N. Shapell, Esq.
Harold F. Golding, Esq.
Joseph M. Niland, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 85-1544 this date.

The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

Filing Time

A petition must be *received in the Clerk's Office* within 14 days after the judgment date set forth above. *No extension will be granted save for the most compelling reasons.* Requests based on grounds such as miscalculation of time or a need to consult with others will be peremptorily denied.

Purpose

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.

2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.

3. An apparent conflict with another decision of the Court which is not addressed in the opinion.

Statement of Counsel

A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose" section. The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.

Form

The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

Bill of Costs (FRAP 39)

Filing Time

A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

Mandate (FRAP 41)

Issuance Time

The mandate is issued 21 days after judgment. A *timely* petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

Stay

A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

JOHN M. GREACEN
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. R-84-880

SHAARE TEFILA CONGREGATION,
11120 Lockwood Drive
Silver Spring, Maryland 20901
INDIVIDUALLY AND ON BEHALF OF ITS MEMBERS

and

RABBI MARTIN S. HALPERN
Shaare Tefila Congregation
11120 Lockwood Drive
Silver Spring, Maryland 20901

and

SHIRLEY ALTMAN
10806 Wheeler Drive
Silver Spring, Maryland 20901

and

WILLIAM HARKAWAY
1010 Nora Drive
Silver Spring, Maryland 20904

and

MARSHALL S. LEVIN
Shaare Tefila Congregation
11120 Lockwood Drive
Silver Spring, Maryland 20901

and

MAURICE POTOSKY
3505 Beret Lane
Silver Spring, Maryland 20906

and

DR. JACOB TELLER
1401 Chilton Drive
Silver Spring, Maryland 20904,
Plaintiffs,

v.

JOHN WILLIAM COBB
9316 Piney Branch Road
Apartment 102
Silver Spring, Maryland 20903

and

WILLIAM RANDALL HARRIS
11700 Old Columbia Pike
Apartment 107
Silver Spring, Maryland 20904

and

THOMAS LLOYD HEINE
11612 Stewart Lane
Apartment 402
Silver Spring, Maryland 20904

and

WILLIAM HESS
(current residence address unknown)

and

THOMAS JOSEPH HUNT, JR.
11311 Old Columbia Pike
Apartment B-8
Silver Spring, Maryland 20904

and

RAYMOND LEE JORDAN
11416 Stewart Lane
Apartment B-1
Silver Spring, Maryland 20904

and

DOMINIC QUEEN
12919 Broadmore Road
Silver Spring, Maryland 20904

and

MICHAEL DAVID REMER
10506 Hutting Place
Wheaton, Maryland 20902,
Defendants.

Complaint

1. This class action is brought for declaratory and injunctive relief and damages for violations of the federal civil rights acts, 42 U.S.C. §§ 1981, 1982, and 1985(3), and for violations of Maryland common law. This action is brought to redress the injury caused by defendants' conspiracy to desecrate and their desecration of the synagogue of the Shaare Tefila Congregation in Silver Spring, Maryland.

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1343(a)(1) and (4); 28 U.S.C. §§ 2201 and 2202; and principles of pendent jurisdiction.

The Parties

3. Shaare Tefila Congregation ("the Congregation") is a Jewish community of approximately 500 member families which is organized as a non-stock, membership religious corporation under the laws of the State of Maryland. The Congregation assembles for the purpose of worship and other community activities. Members of

Shaare Tefila Congregation reside in Maryland and the District of Columbia. The Congregation holds title to real property at 11120 Lockwood Drive, Silver Spring, Maryland, and owns a synagogue at that address.

4. Plaintiffs Shirley Altman, William Harkaway, Maurice Potosky, and Dr. Jacob Teller are citizens of the United States and residents of the State of Maryland. They are members of Shaare Tefila Congregation.

5. Plaintiffs Rabbi Martin S. Halpern and Marshall S. Levin are citizens of the United States and residents of the State of Maryland. They are employees of Shaare Tefila Congregation.

6. Plaintiffs sue on their own behalf and on behalf of the members and employees of Shaare Tefila Congregation.

7. Defendants John William Cobb, William Randall Harris, Thomas Lloyd Heine, William Hess, Thomas Joseph Hunt, Jr., Raymond Lee Jordan, Dominic Maurice Queen, and Michael David Remer are citizens of the United States and residents of Maryland.

Class Action Allegations

8. Plaintiffs bring this action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of themselves and the class of members and employees of Shaare Tefila Congregation.

9. The class described in paragraph 8 is so numerous, at approximately 500 family member units and 40 employees, that joinder of all its members is impracticable. There are questions of law or fact common to the class: proof of the conduct of the defendants in desecrating the synagogue is a common factual issue and establishing the unlawfulness of defendants' conduct is a common legal issue to the class. The claims of the representative parties are typical of the claims of the class. The repre-

sentative parties will fairly and adequately protect the interests of the class. Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Factual Statement

10. On the evening of November 1, 1982, defendants met behind the Drug Fair at White Oak Shopping Center in Silver Spring, Maryland. Defendants conspired to and some or all of the defendants spray-painted words and symbols on the outside wall of the Drug Fair, including a burning cross, the slogans "White Power" and "Aryan Brotherhood," the initials "KKK," an eagle with a swastika, a Star of David with an arrow through it, and initials of the defendants.

11. Defendants conspired at the Drug Fair to deface and desecrate the synagogue of Shaare Tefila Congregation. In furtherance of that conspiracy, they left the Drug Fair as a group and went to Shaare Tefila Congregation. On the way to the synagogue, some or all of the defendants painted a swastika on a car owned by plaintiff Jacob Teller, which was parked in front of the synagogue. Defendants acted willfully and wantonly in painting Dr. Teller's car.

12. Defendants entered the property of Shaare Tefila Congregation without permission or acquiescence of the Congregation or any of its members. Defendants conspired to and some or all of the defendants painted words and symbols on the outside walls of the synagogue owned by Shaare Tefila Congregation, including swastikas, a skull and cross-bones, a burning cross, and the slogans "Toten Kamf Raban," "Dead Jew," "Death to the Jude," "Ku Klux Klan" and "In, Take a Shower Jew." Defendants acted willfully and wantonly in defacing the synagogue and, by reason of their conspiracy and conduct, all are responsible.

13. The words and symbols painted on the synagogue by defendants vividly evoke the horrors of the Holocaust and the systematic killing of over 6 million Jews. The defendants' conduct in painting these words and symbols was shocking and horrifying. Defendants' intent to injure, harass and intimidate the members of the Congregation because they are Jews is shown by, *inter alia*, the virulently anti-Semitic nature of the words and symbols they painted.

14. Members of the Congregation suffered great emotional distress as well as fear for the safety of the Congregation and of its synagogue upon learning of the desecration of the synagogue.

15. Defendants defaced the synagogue with indelible paint which could not be completely removed by washing the walls. The Congregation had to repaint the defaced walls to cover the anti-Semitic words and symbols painted by the defendants.

16. On June 15, 1983, a jury in the Circuit Court for Montgomery County, Maryland convicted defendant Michael David Remer of conspiracy to commit malicious destruction of property and destruction of property for the desecration of the synagogue of Shaare Tefila Congregation.

17. On April 26, 1983, defendant William Randall Harris pleaded guilty in the Circuit Court for Montgomery County to conspiracy to commit malicious destruction of property for the desecration of the synagogue of Shaare Tefila Congregation.

Count I—42 U.S.C. § 1981

18. Plaintiffs reallege and incorporate herein by reference the allegations in paragraphs 1 through 17.

19. Defendants' desecration of the synagogue of Shaare Tefila Congregation deprived plaintiffs of the full and equal benefit of laws for the security of persons and property. Defendants' desecration of the synagogue was motivated by racial prejudice in that defendants perceive

plaintiffs as racially distinct because they are Jews, all in violation of 42 U.S.C. § 1981.

Count II—42 U.S.C. § 1982

20. Plaintiffs reallege and incorporate herein by reference the allegations in paragraphs 1 through 19.

21. Defendants' desecration of the synagogue of Shaare Tefila Congregation deprived plaintiffs of the right to hold real and personal property. Defendants' desecration of the synagogue was motivated by racial prejudice in that defendants perceive plaintiffs as racially distinct because they are Jews, all in violation of 42 U.S.C. § 1982.

Count III—42 U.S.C. § 1985(3)

22. Plaintiffs reallege and incorporate herein by reference the allegations in paragraphs 1 through 21.

23. By conspiring to and desecrating the synagogue of Shaare Tefila Congregation, defendants conspired for the purpose of depriving, either directly or indirectly, the class of members of Shaare Tefila Congregation of the equal protection of the laws or of equal privileges and immunities under the laws, including, but not limited to, plaintiffs' federal constitutional right to travel, 42 U.S.C. §§ 1981 and 1982, plaintiffs' right to assemble and worship, Maryland criminal laws prohibiting destruction of property and conspiracy to destroy property, and Maryland common law prohibiting trespass, nuisance and intentional infliction of emotional distress.

24. Defendants committed acts in furtherance of the conspiracy, including coming onto the property of the Congregation without acquiescence or consent and defacing the synagogue, thereby injuring plaintiffs in their persons and property.

25. Defendants were motivated by an invidiously discriminatory animus to injure plaintiffs because plaintiffs are Jews, all in violation of 42 U.S.C. § 1985(3).

Count IV—Pendent State Claim for Trespass

26. Plaintiffs reallege and incorporate herein by reference the allegations in paragraphs 1 through 25.

27. Defendants unlawfully entered upon land owned by and in the possession of Shaare Tefila Congregation, without the permission or acquiescence of the Congregation or its members. Defendants caused damage to the synagogue of the Congregation and injury, mental pain and suffering to plaintiffs, all in violation of the common law of Maryland.

Count V—Pendent State Claim for Nuisance

28. Plaintiffs reallege and incorporate herein by reference the allegations in paragraphs 1 through 27.

29. By defendants' desecration of the synagogue, they caused damage to the synagogue of the Congregation and injury, mental pain and suffering to plaintiffs in their legitimate enjoyment of their reasonable rights in the property owned by Shaare Tefila Congregation, all in violation of the common law of Maryland.

Count VI—Pendent State Claim for Intentional Infliction of Emotional Distress

30. Plaintiffs reallege and incorporate herein by reference the allegations in paragraphs 1 through 29.

31. Defendants caused severe mental and emotional distress to the individual named plaintiffs and the class of members of Shaare Tefila Congregation by their intentional, extreme and outrageous acts alleged herein, all in violation of the common law of Maryland.

Prayer

WHEREFORE, Plaintiffs pray that this Court:

a) Declare that defendants' conduct alleged herein violated plaintiffs' rights protected by 42 U.S.C. §§ 1981, 1982 and 1985(3), and Maryland common law;

b) Hold that plaintiffs' remedies at law are inadequate to prevent or deter future violations of their rights as alleged herein, and permanently enjoin defendants, and all others in active concert or participation with them who receive notice of the Court's Order, from harassing, threatening, insulting, or intimidating plaintiffs or other Jewish persons or organizations in the Washington metropolitan area; trespassing on plaintiffs' property or the property of other Jewish persons or organizations in the Washington metropolitan area; or otherwise interfering with plaintiffs or other Jewish persons or organizations in their right to be secure in their persons and property, to hold real and personal property and to travel interstate;

c) Enter judgment awarding plaintiffs damages as follows: $3000 as compensatory damages for repainting the walls of the synagogue, and compensatory damages for mental and emotional distress and punitive damages for the defendants' willful and wanton conduct in such substantial amount as, in light of the facts adduced, is just. Any and all damages recovered by plaintiffs will be contributed to the Montgomery County Human Relations Commission;

d) Award plaintiffs their costs and attorneys' fees as provided by law; and

e) Grant such other relief as may be just.

HOGAN & HARTSON

By /s/ Joseph M. Hassett
JOSEPH M. HASSETT
JOHN C. KEENEY, JR.
PATRICIA A. BRANNAN
DANIEL S. COHEN
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Attorneys for Plaintiffs

Of Counsel:

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(202) 842-4377

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Civil Action No. R84-880

SHAARE TEFILA CONGREGATION, *et al.*,
Plaintiffs,

v.

JOHN WILLIAM COBB, *et al.*,
Defendants.

DECLARATION OF MARSHALL S. LEVIN

1. I am the Executive Director of Shaare Tefila Congregation. I held that position on November 1, 1982.

2. On the night of November 1, 1982, I attended a meeting of the Congregation Board of Directors at the synagogue. I remained after the meeting to speak with the President of the Congregation when a call came through at approximately 10:30 p.m. that the car of one of the Board Members had been spray-painted with a swastika while parked outside the synagogue during the meeting. I went outside to search for possible further damage and discovered that the outside walls of the synagogue had been extensively defaced with anti-Semetic slogans and symbols.

3. The spray-painted slogans and symbols remained on the outside walls of the synagogue for six days and I had frequent occasion to view them. I have examined the photographs numbered 1 thru 6 which are Attachments to this Declaration. The photographs accurately portray the outside walls of the synagogue as they appeared from the night of November 1, 1982, until November 7, 1982.

4. The synagogue of Shaare Tefila Congregation is located in Silver Spring, Maryland. It is approximately 2 miles from the District of Columbia line.

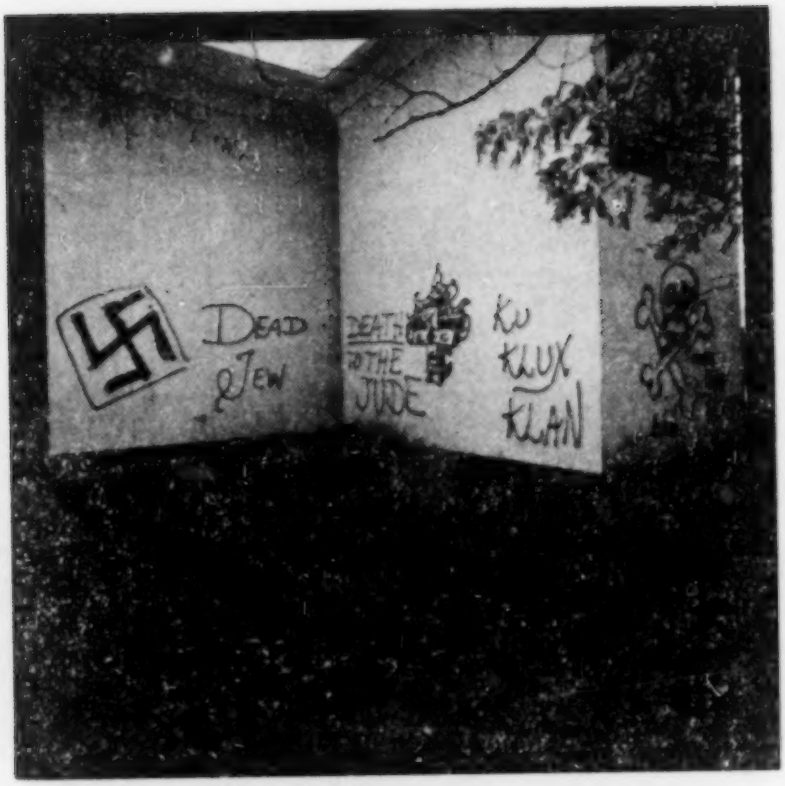
5. As Executive Director of the Congregation, I am responsible, among other duties, for supervising its membership list. Members of Shaare Tefila Congregation reside in Maryland, the District of Columbia, and Virginia.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Marshall S. Levin
MARSHALL S. LEVIN

Executed on 12/17/84.

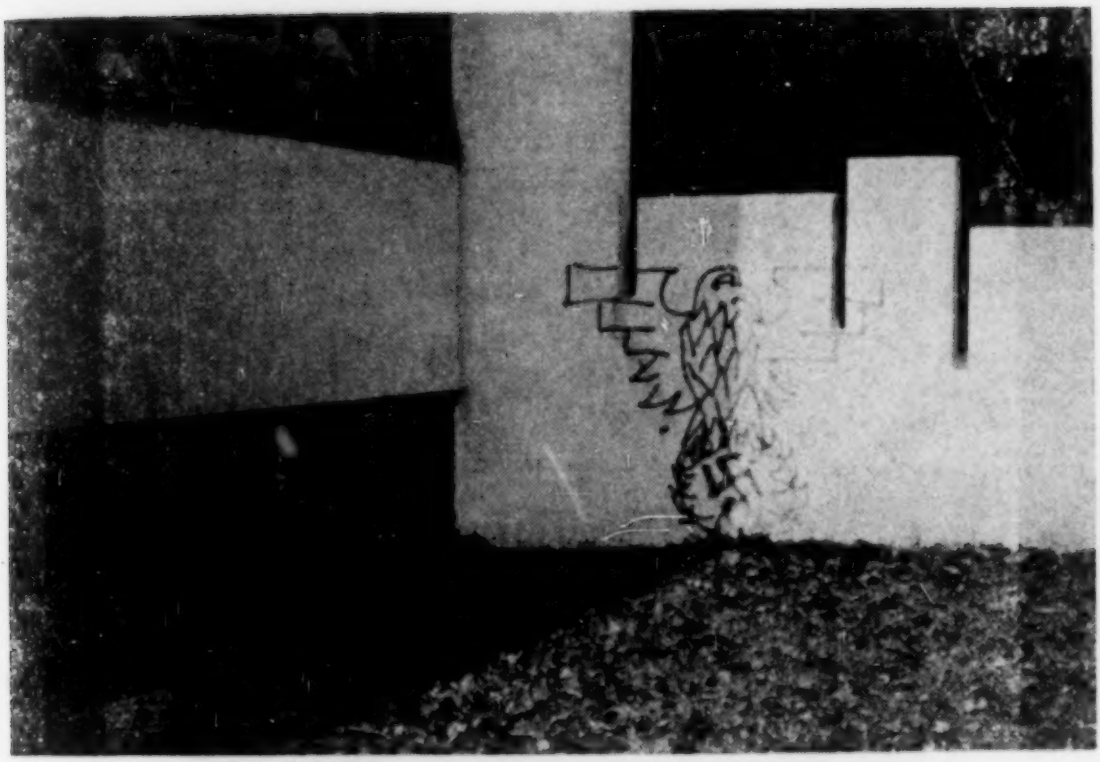
ATTACHMENT 1



ATTACHMENT 2



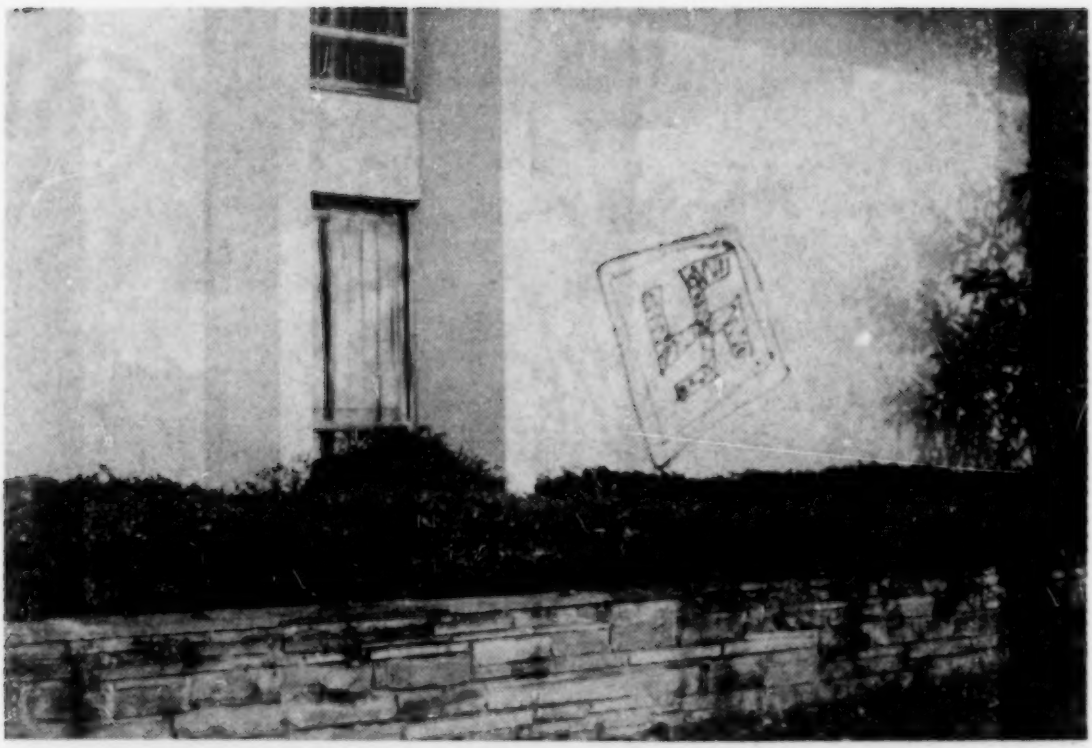
ATTACHMENT 3



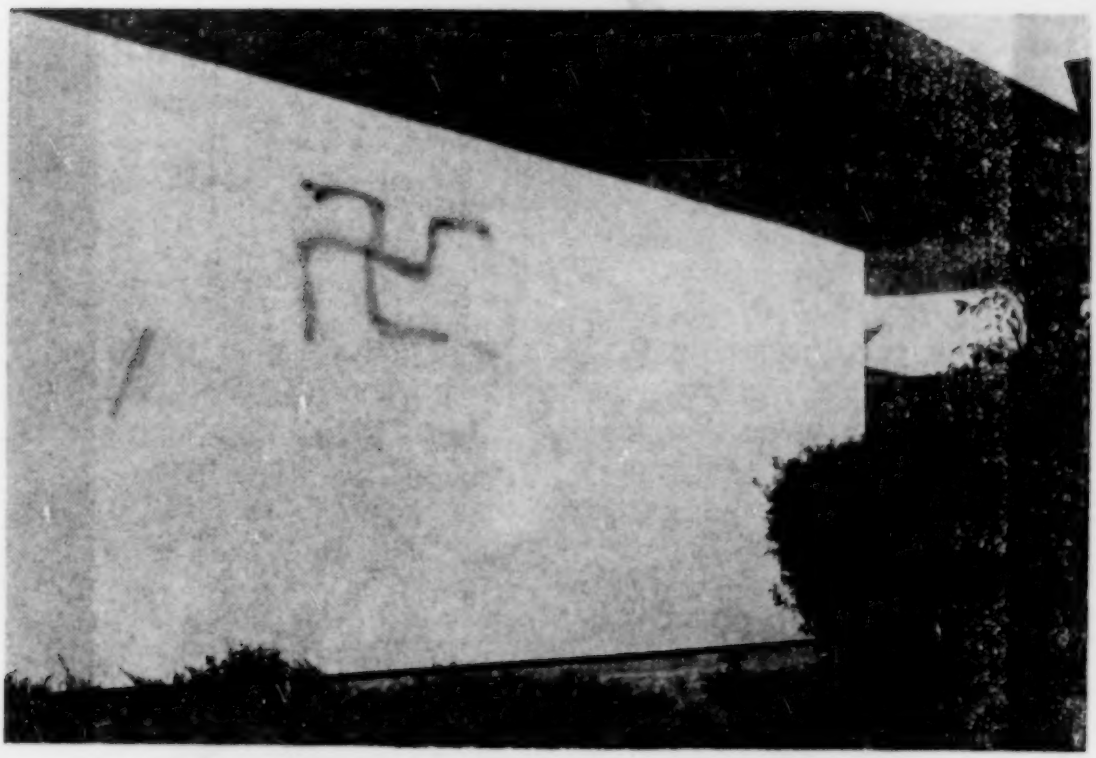
ATTACHMENT 4



ATTACHMENT 5



ATTACHMENT 6



APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Civil Action No. R84-880

SHAARE TEFILA CONGREGATION, *et al.*,
Plaintiffs,

v.

JOHN WILLIAM COBB, *et al.*,
Defendants.

DECLARATION OF DAVID M. CHALMERS

1. I am a Professor in the Department of History at the University of Florida, Gainesville, Florida. I received my bachelor's degree from Swarthmore College in 1949 and my PhD. in history from the University of Rochester in 1955. I have been a Fulbright exchange professor at the Universities of Ceylon, Tokyo, and the Philippines.

2. Among my current activities is service as the Chair of the Program Committee of the Southern Historical Association. I have also been on the Executive Council of the Southern Historical Association, on the Board of Editors of *The Journal of Southern History* and a Consulting Editor of *American Studies International.*

3. I have written or edited six books, including *Hooded Americanism: The History of the Ku Klux Klan* (Doubleday, 1965, 2nd Rev. Ed. Franklin Watts, 1981). *Hooded Americanism* is a comprehensive study of the Klan from its inception shortly after the Civil War to its contemporary activity. In the course of researching and writing *Hooded Americanism,* I reviewed extensive Klan

writings and literature about the Klan. In addition to *Hooded Americanism*, I have published numerous journal and encyclopedia articles on the Ku Klux Klan. A partial list of titles is attached as Attachment A to this Declaration.

4. As a result of my research and writing described above, I have developed extensive familiarity with the history and ideology of the Ku Klux Klan. In addition to the publication of formal studies, I have maintained an active interest in and familiarity with the Ku Klux Klan and various other similar organizations.

5. Based on my experience and familiarity with the Ku Klux Klan, I am aware that a prevalent belief among the various Ku Klux Klan groups is that Jewish people are racially distinct from whites.

6. I have examined the photographs of the symbols and slogans painted on the synagogue of Shaare Tefila Congregation which are attached to the Declaration of Marshall S. Levin. I recognize the burning cross as the symbol of the Ku Klux Klan. One of the Klan's methods of harassing and intimidating Blacks, Jews, or others it finds abhorrent historically has been to burn a cross on that person's property.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ David M. Chalmers
DAVID M. CHLMERS

Executed on 19 December 1984.

David Chalmers
University of Florida

Articles

"The Rise and Fall of the Invisible Empire of the Ku Klux Klan," CONTEMPORARY REVIEW (London), 237 (1980), 57-64.

"Rule by Terror, The History of the Ku Klux Klan," AMERICAN HISTORY *Illustrated*, XIV (January 1980), 8-9, 44-48; (February 1980).

"George W. Norris, A Virtuous, Old-fashioned Biography, But Neither Times Nor Life," REVIEWS IN AMERICAN HISTORY, 7 (September 1979), 413-417.

"Race and Racial Thinking," NEW-YORK HISTORICAL SOCIETY QUARTERLY, LVI (April 1972), 155-161.

"The Ku Klux Klan in the 1920s," THE MISSISSIPPI QUARTERLY, XVIII (1965), 234-247.

"The Ku Klux Klan and the Radical Right," in THE RADICAL RIGHT: Proceedings of the Sixth Annual Intergroup Relations Conference (University of Houston 1965), pp. 3-9.

"American Studies in Japan and East Asia," EXCHANGE, IV (1968), 47-54.

"The Ku Klux Klan in the Sunshine State: The 1920s," FLORIDA HISTORICAL QUARTERLY, XLII (1964), 209-215.

THE UNITED STATES: LAND OF THREE HUNDRED RELIGIONS, Buddhist University Press (Colombo, 1963), 35pp.

"Ceylon and American Communalism," UNIVERSITY OF CEYLON REVIEW, XIX (1961), 40-44.

"From Robber Barons to Industrial Statesmen: Standard Oil and the Business Historians," AMERICAN JOURNAL OF ECONOMICS AND SOCIOLOGY, 20 (1960), 47-58.

"The Tammany Tiger Runs Scared," THE PROGRESSIVE, 24 (July 1960), 18-22.

"The Muckrakers and the Growth of Corporate Power," AMERICAN JOURNAL OF ECONOMICS AND SOCIOLOGY, 18 (1959), 295-311.

"Ray Stannard Baker's Search for Reform," JOURNAL OF THE HISTORY OF IDEAS, XIX (1958), 422-434.

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FUNK & WAGNALLS
ENCYCLOPEDIA AMERICANA
AMERICAN PEOPLE'S ENCYCLOPEDIA
DICTIONARY OF AMERICAN HISTORY
ENCYCLOPEDIA OF SOUTHERN HISTORY
DICTIONARY OF SOUTHERN RELIGION

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Civil Action No. R84-880

SHAARE TEFILA CONGREGATION, *et al.*,
Plaintiffs,

v.

JOHN WILLIAM COBB, *et al.*,
Defendants.

DECLARATION OF ROBERT WOLFE

1. I am Chief of the Modern Military Headquarters Branch of the National Archives. Among my other responsibilities, I am the custodian of captured documents of the Third Reich.

2. I served as an infantry officer in the South Pacific and Europe during the years 1942 to 1945. Thereafter I was in the Information Control Division of the United States Military Government of Germany until October 1948. I received the degree of Bachelor of Philosophy from the University of Vermont in 1942 and a Master of Philosophy from Columbia University as of 1955.

3. I have served the National Archives since 1961. Before my present position, I served successively as a specialist for captured records and for Modern European history and as chief of its Captured Records Branch. I joined the National Archives' staff upon concluding service as a member of the American Historical Association team microfilming captured records at the World War II Records Cente[illegible]1 Alexandria, Virginia.

4. I have written or contributed to several National Archives finding aids for captured records, and have presented papers and commentary on captured records and related topics at American Historical Association Meetings and other symposia and conferences. A list of my publications and papers are Attachment A to this Declaration. I have been on the Board of Directors of the American Committee on the History of the Second World War since 1972, and of the Conference Group on German Politics from 1975 to 1983. I was appointed Special Advisor to Eli Weisel, Chairman of the United States Holocaust Memorial Council, in May 1982. I was elected to the Executive Board of the Conference Group for Central European History of the American Historical Association for a two-year term beginning in January 1983.

5. In addition to my other activities, I have directed conferences at the National Archives on captured records and on the Nuremberg trials, respectively, and edited the published proceedings of the conference on *Captured German and Related Records* (Ohio U. Press 1975). I visited German archives and historical institutes as a guest of the Federal German Government in 1965. As a guest of the Polish Government, in 1979 I visited Polish archives to examine records of the German occupation of that country from 1939 to 1944. I have been Archival Consultant to the State Department for the Berlin Document Center since 1969. I was awarded the Merit Cross, First Class, of the Federal Republic of Germany, on March 15, 1979.

6. As a result of my experience and activities described above, I have developed extensive knowledge of the records kept by the German government and by the Nazi Party from 1919 to May 8, 1945, and the contents of those documents. I also have extensive knowledge of the Nazi ideology reflected in those documents.

7. It was one of the central tenets of Nazi ideology that Jews were defined as racially distinct from Aryan, or white, German citizens. This principle was not only a basic aspect of Nazi Party ideology as stated in points 4 to 6 and 23 of the Party Program promulgated on February 24, 1920, but was incorporated into German law by the Nuremberg Laws of September 15, 1935 and November 14, 1935, which defined Jews as a specific and distinct race and withdrew from Jews the rights of German citizens. *See* Attachments B and C to this Declaration.

8. I have examined the photographs of the symbols and slogans painted on the synagogue of Shaare Tefila Congregation which are attached to the Declaration of Marshall S. Levin. The swastika was the symbol of the Nazi Party from its inception, and the phrases "DEAD JEW," "DEATH TO THE JUDE" (Jude is German for Jew), and "IN, TAKE A SHOWER JEW" can be identified as references to the Third Reich's "final solution to the Jewish problem"—the Holocaust. The phrase "TOTEN KAMF RABAND" next to the skull and crossbones painted on the synagogue is apparently a reference to the Totenkopfverbände, which were the "death head units" of concentration camp guards from 1936 through World War II. The skull and crossbones was the insignia of the Totenkopfverbände.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Robert Wolfe
ROBERT WOLFE

Executed on December 20, 1984.

ATTACHMENT A

Publications and Papers of Robert Wolfe, Chief Modern Military Headquarters Branch, National Archives

Guides to German Records Microfilmed at Alexandria, Va.,

No. 36. Miscellaneous German Records Collection, Part III, 1962 (co-author).

No. 37. Records of Headquarters, Germany Navy High Command, 1962.

No. 33. Records of the Reichsfuehrer-SS and Chief of Germany Police, Part II, 1961, (co-author); No. 39. Part III, 1963 (principle author); and No. 81. Part IV, 1982, (co-author).

Editor, *Captured German and Related Records* (Ohio University Press, 1974).

"Current and Future National Archives Programs for Captured Records," National Archives Conference on Captured German and Related Records, November 13, 1968 (published in *Captured German and Related Records*, cited above).

"Captured Foreign Records as Resources for the Study of U.S. Foreign Relations," National Archives Conference on the Archives of U.S. Foreign Relations, June 17, 1969.

"The Ideology of Elitism in the SS," commentary, Annual Meeting of the AHA, Washington, D.C., December 30, 1969.

"Putative Threat to National Security as a Nurenberg Alibi for Genocide," Conference on the Church Struggle and Holocaust, March 1974; published in *Annals of the American Association for the Political and Social Sciences*, July 1980.

"The London Charter," AHA Annual Meeting, Chicago, December 1974.

"From Information Control to Media Freedom in Occupied Germany," AHA Annual Meeting, San Francisco, 1978.

"To Embellish the Truth of the Holocaust is Unnecessary," International Liberators Conference, October 1981.

"Nazi Paperwork for the Final Solution," AHA, San Francisco, December 1983.

Editor, *Americans as Proconsuls: U.S. Military Government in Germany and Japan, 1944-52* (Southern Illinois University Press, Carbondale, Illinois, 1984).

Participant, Aspen Institute Berlin and Hannover University conference on "American Higher Educational and Research Policy in Germany, 1945-1952," July 1-7, 1984.

"Sharing Records of Mutual Archival Concern to the Federal Republic of Germany and the United States of America," paper presented in the Special Plenary Session of the International Congress on Archives, Bonn, September 21, 1984.

Chief interviewer and prospective co-editor of an oral history project of the Conference Group on German Politics entitled "Foundations of the Federal German Republic," subsidized by a McCloy Fund grant. Already interviewed (transcriptions available) have been Gen. Lucius D. Clay (2 hours, 1977), John J. McCloy (2 hours, 1979), and James J. Riddleberger (6 hours, 1979-1980).

ATTACHMENT B

The Programme of the German Workers' Party is designed to be of limited duration. The leaders have no intention, once the aims announced in it have been achieved, of establishing fresh ones, merely in order to increase, artificially, the discontent of the masses and so ensure the continued existence of the Party.

1. We demand the union of all Germans in a Greater Germany on the basis of the right of national self-determination.

2. We demand equality of rights for the German people in its dealings with other nations, and the revocation of the peace treaties of Versailles and Saint-Germain.

3. We demand land and territory (colonies) to feed our people and to settle our surplus population.

4. Only members of the nation may be citizens of the State. Only those of German blood, whatever their creed, may be members of the nation. Accordingly, no Jew may be a member of the nation.

5. Non-citizens may live in Germany only as guests and must be subject to laws for aliens.

6. The right to vote on the State's government and legislation shall be enjoyed by the citizens of the State alone. We demand therefore that all official appointments, of whatever kind, whether in the Reich, in the states or in the smaller localities, shall be held by none but citizens.

We oppose the corrupting parliamentary custom of filling posts merely in accordance with party considerations, and without reference to character or abilities.

7. We demand that the State shall make it its primary duty to provide a livelihood for its citizens. If it should prove impossible to feed the entire population, foreign nationals (non-citizens) must be deported from the Reich.

8. All non-German immigration must be prevented. We demand that all non-Germans who entered Germany after 2 August 1914 shall be required to leave the Reich forthwith.

9. All citizens shall have equal rights and duties.

10. It must be the first duty of every citizen to perform physical or mental work. The activities of the individual must not clash with the general interest, but must proceed within the framework of the community and be for the general good.

We demand therefore:

11. The abolition of incomes unearned by work.

The breaking of the slavery of interest

12. In view of the enormous sacrifices of life and property demanded of a nation by any war, personal enrichment from war must be regarded as a crime against the nation. We demand therefore the ruthless confiscation of all war profits.

13. We demand the nationalization of all businesses which have been formed into corporations (trusts).

14. We demand profit-sharing in large industrial enterprises.

15. We demand the extensive development of insurance for old age.

16. We demand the creation and maintenance of a healthy middle class, the immediate communalizing of big department stores, and their lease at a cheap rate to small traders, and that the utmost consideration shall be shown to all small traders in the placing of State and municipal orders.

17. We demand a land reform suitable to our national requirements, the passing of a law for the expropriation of land for communal purposes without compensation; the

abolition of ground rent, and the prohibition of all speculation in land.

18. We demand the ruthless prosecution of those whose activities are injurious to the common interest. Common criminals, usuers, profiteers, etc., must be punished with death, whatever their creed or race.

19. We demand that Roman Law, which serves a materialistic world order, be replaced by a German common law.

20. The State must consider a thorough reconstruction of our national system of education (with the aim of opening up to every able and hard-working German the possibility of higher education and of thus obtaining advancement). The curricula of all educational establishments must be brought into line with the requirements of practical life. The aim of the school must be to give the pupil, beginning with the first sign of intelligence, a grasp of the notion of the State (through the study of civic affairs). We demand the education of gifted children of poor parents, whatever their class or occupation, at the expense of the State.

21. The State must ensure that the nation's health standards are raised by protecting mothers and infants, by prohibiting child labour, by promoting physical strength through legislation providing for compulsory gymnastics and sports, and by the extensive support of clubs engaged in the physical training of youth.

22. We demand the abolition of the mercenary army and the formation of a people's army.

23. We demand legal warfare on deliberate political mendacity and its dissemination in the press. To facilitate the creation of a German national press we demand:

(a) that all editors of, and contributors to newspapers appearing in the German language must be members of the nation;

(b) that no non-German newspapers may appear without the express permission of the State. They must not be printed in the German language;

(c) that non-Germans shall be prohibited by law from participating financially in or influencing German newspapers, and that the penalty for contravening such a law shall be the suppression of any such newspaper, and the immediate deportation of the non-Germans involved.

The publishing of papers which are not conducive to the national welfare must be forbidden. We demand the legal prosecution of all those tendencies in art and literature which corrupt our national life, and the suppression of cultural events which violate this demand.

24. We demand freedom for all religious denominations in the State, provided they do not threaten its existence nor offend the moral feelings of the German race.

ATTACHMENT C

5 *Law for the Protection of German Blood and German Honour, 15 September 1935*

Entirely convinced that the purity of German blood is essential to the further existence of the German people, and inspired by the uncompromising determination to safeguard the future of the German nation, the Reichstag has unanimously resolved upon the following law, which is promulgated herewith:

Section 1

1. Marriages between Jews and citizens of German or kindred blood are forbidden. Marriages concluded in defiance of this law are void, even if, for the purpose of evading this law, they were concluded abroad.

2. Proceedings for annulment may be initiated only by the Public Prosecutor.

Section 2

Sexual relations outside marriage between Jews and nationals of German or kindred blood are forbidden.

Section 3

Jews will not be permitted to employ female citizens of German or kindred blood as domestic servants.

Section 4

1. Jews are forbidden to display the Reich and national flag or the national colours.

2. On the other hand they are permitted to display the Jewish colours. The exercise of this right is protected by the State.

Section 5

1. A person who acts contrary to the prohibition of Section 1 will be punished with hard labour.

2. A person who acts contrary to the prohibition of Section 2 will be punished with imprisonment or with hard labour.

3. A person who acts contrary to the provisions of Sections 3 or 4 will be punished with imprisonment up to a year and with a fine, or with one of these penalties.

Section 6

The Reich Minister of the Interior in agreement with the Deputy Führer and the Reich Minister of Justice will issue the legal and administrative regulations required for the enforcement and supplementing of this law.

Section 7

The law will become effective on the day after its promulgation; Section 3, however, not until 1 January 1936.

6 *The Reich Citizenship Law, 15 September 1935*

The Nuremberg Laws by their general nature formalized the unofficial and particular measures taken against Jews up to 1935. The Nazi leaders made a point of stressing the consistency of this legislation with the Party programme which demanded that Jews should be deprived of their rights as citizens. The Reich Citizenship Law stripped Jews of their German citizenship and introduced a new distinction between 'Reich citizens' and 'nationals'. Certificates of Reich citizenship were in fact never introduced and all Germans other than Jews were until 1945 provisionally classed as Reich citizens.

Article 1

1. A subject of the State is a person who belongs to the protective union of the German Reich, and who therefore has particular obligations towards the Reich.

2. The status of subject is acquired in accordance with the provisions of the Reich and State Law of Citizenship.

Article 2

1. A citizen of the Reich is that subject only who is of German or kindred blood and who, through his conduct, shows that he is both desirous and fit to serve the German people and Reich faithfully.

2. The right to citizenship is acquired by the granting of Reich citizenship papers.

3. Only the citizen of the Reich enjoys full political rights in accordance with the provision of the laws.

Article 3

The Reich Minister of the Interior in conjunction with the Deputy of the Führer will issue the necessary legal and administrative decrees for carrying out and supplementing this law.

7 *First Regulation under the Reich Citizenship Law, 14 November 1935*

These laws also paved the way for a more systematic persecution of the Jews, for the Reich Citizenship Law was followed during the Third Reich by a series of supplementary regulations. A major outstanding problem was that of the definition of a 'Jew'. Since the beginning of 1935 the matter had been discussed by Party leaders, who pressed for the application of legislation to all half-Jews. The Nuremberg Laws, drafted by civil servants, failed to provide a clear answer (Hitler had struck out the term 'full Jews' from the draft of the Citizenship Law as it involved a new classification). Dr. Bernhard Lösener, a high official in the Reich Ministry of the Interior who had assisted in the drafting of the Nuremberg Laws, produced a memorandum on 1 November which discussed the position of half-Jews. Lösener proposed the

inclusion of those half-Jews who were married to a Jewish person and who adhered to the Jewish religion. (The choice of religion for want of a better alternative was inconsistent with Nazi ideology which saw the Jew as a racial rather than a religious being.) Lösener's suggestions were included in the first regulation under the Citizenship Law, issued on 14 November 1935:

Article 1

1. Until further regulations regarding citizenship papers are issued, all subjects of German or kindred blood, who possessed the right to vote in the Reichstag elections at the time the Citizenship Law came into effect, shall for the time being possess the rights of Reich citizens. The same shall be true of those to whom the Reich Minister of the Interior, in conjunction with the Deputy of the Führer, has given preliminary citizenship.

2. The Reich Minister of the Interior, in conjunction with the Deputy of the Führer, can withdraw the preliminary citizenship.

Article 2

1. The regulations in Article 1 are also valid for Reich subjects of mixed Jewish blood.

2. An individual of mixed Jewish blood is one who is descended from one or two grandparents who were racially full Jews, in so far as he or she does not count as a Jew according to Article 5, paragraph 2. One grandparent shall be considered as full-blooded if he or she belonged to the Jewish religious community.

Article 3

Only the Reich citizen, as bearer of full political rights, exercises the right to vote in political affairs or can hold office. The Reich Minister of the Interior, or any agency empowered by him, can make exceptions during the

transition period, with regard to occupation of public office. The affairs of religious organizations will not be affected.

Article 4

1. A Jew cannot be a citizen of the Reich. He has no right to vote in political affairs and he cannot occupy public office.

2. Jewish officials will retire as of 31 December 1935. If these officials served at the front in the world war, either for Germany or her allies, they will receive in full, until they reach the age limit, the pension to which they were entitled according to the salary they last received; they will, however, not advance in seniority. After reaching the age limit, their pensions will be calculated anew, according to the salary last received, on the basis of which their pension was computed.

3. The affairs of religious organizations will not be affected.

4. The conditions of service of teachers in Jewish public schools remain unchanged until new regulations for the Jewish school systems are issued.

Article 5

1. A Jew is anyone who is descended from at least three grandparents who are racially full Jews. Article 2, para. 2, second sentence will apply.

2. A Jew is also one who is descended from two full Jewish parents, if (a) he belonged to the Jewish religious community at the time this law was issued, or joined the community later, (b) he was married to a Jewish person, at the time the law was issued, or married one subsequently, (c) he is the offspring of a marriage with a Jew, in the sense of Section 1, which was contracted after the Law for the Protection of German Blood and German Honour became effective, (d) he is the offspring of an

extramarital relationship with a Jew, according to Section 1, and will be born out of wedlock after 31 July 1936.

Article 6

1. Requirements for the pureness of blood as laid down in Reich Law or in orders of the NSDAP and its echelons —not covered in Article 5—will not be affected.

2. Any other requirements for the pureness of blood, not covered in Article 5, can be made only by permission of the Reich Minister of the Interior and the Deputy Führer. If any such demands have been made, they will be void as of 1 January 1936, if they have not been requested by the Reich Minister of the Interior in agreement with the Deputy Führer. These requests must be made by the Reich Minister of the Interior.

Article 7

The Führer and Reich Chancellor can grant exemptions from the regulations laid down in the law.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. A-876

85-2156

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

SHAARE TEFILA CONGREGATION, ET AL.,

Petitioners

v.

JOHN WILLIAM COBB, ET AL.,

Respondents

BRIEF OF MICHAEL DAVID REMER IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT B. BARNHOUSE
DEBORAH T. GARREN
PIPER & MARBURY
1100 Charles Center South
36 S. Charles Street
Baltimore, Maryland 21201
(301) 539-2530

ATTORNEYS FOR RESPONDENT
MICHAEL DAVID REMER

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were appellants (now petitioners) Shaare Tefila Congregation, Rabbi Martin S. Halpern, Shirley Altman, William Harkaway, Marshall S. Levin, Maurice Potosky and Dr. Jacob Teller. Petitioners will be referred to collectively herein as "the Congregation." The defendants in the District Court were John William Cobb, William Randall Harris, Thomas Lloyd Heine, William Hess, Thomas Joseph Hunt, Jr., Raymond Lee Jordan, Dominic Queen and Michael David Remer. Only Michael David Remer was an active appellee before the Court of Appeals. This Brief in Opposition is being filed by appointed counsel on behalf of Mr. Remer as a respondent in this Court.

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Gorman v. Sabo, 210 Md. 155 (1956)	8
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. A-876

SHAARE TEFILA CONGREGATION, ET AL.,

Petitioners

v.

JOHN WILLIAM COBB, ET AL.,

Respondents

BRIEF OF MICHAEL DAVID REMER IN OPPOSITION
TO THE PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

This action was filed by the petitioners in the United States District Court for the District of Maryland on March 6, 1984. The Complaint alleged both federal and state claims arising from the alleged vandalization of the synagogue of the Shaare Tefila Congregation in Silver Spring, Maryland. Federal jurisdiction was sought over claims under the civil rights statutes, 42 U.S.C. §§ 1981, 1982 and 1985(3), as well as over pendent state law claims for trespass, nuisance and intentional infliction of emotional distress.

On April 22, 1985, the district court granted a motion to dismiss the Complaint, filed by respondent Michael David Remer, under Rule 12(b)(1) of the Federal Rules of Civil Procedure.[1/] The United States Court of Appeals for the Fourth Circuit affirmed the district court's decision on March 7, 1986, holding that the petitioners had failed to state claims under the federal civil rights laws.

The petitioners now seek certiorari and a right to federal jurisdiction only on their claim under 42 U.S.C. § 1982. In their Petition, they inundated this Court with descriptions of the vandalism, of historical anti-Semitism, and of the respondents' admittedly irrational misapprehensions of Jews as members of a distinct and inferior race.[1/] As described in the Complaint, the reprehensibility of the acts of the respondents, as well as the irrationality of their political and sociological perceptions, cannot be gainsaid. The question is not whether the petitioners are entitled to pursue a remedy -- the question is whether the remedy is to be found in 42 U.S.C. § 1982. In directing the petitioners to other, non-federal remedies, the Fourth Circuit correctly applied this Court's decisions regarding the scope of the

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1/ While Mr. Remer was the only defendant to file a motion to dismiss, the district court found that its decision to decline jurisdiction required dismissal of the action against all of the defendants.

1/ The petitioners' claim that the district court, and, presumably, the Fourth Circuit, erred in excluding voluminous extra-pleading materials which they submitted relating to their anticipated proof. Petition at 8-9. Indeed, they have included in their Petition references to deposition testimony and criminal dispositions which appear nowhere in the appellate record. Petition at 4-8 and 17, n. 17. These non-record facts add nothing of legal substance to the petitioners' claim of federal jurisdiction, and, even if all of these materials are accepted without qualification, they do not better the petitioners' jurisdictional position.

federal statute, and its decision does not conflict with the positions taken by other circuits. Accordingly, certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION IS CONSONANT WITH THE DECISIONS OF THIS COURT, AND A REVERSAL OF THAT DECISION WOULD SUBSTANTIALLY EXPAND THE SCOPE OF THE CIVIL RIGHTS LAWS AND LEAD TO UNDESIRABLE CONSEQUENCES IN THE LOWER COURTS.

In seeking this Court's review of the decision of the U. S. Court of Appeals for the Fourth Circuit, the petitioners have misstated the nature of that court's holding. The Fourth Circuit did not hold that "the plaintiff in an action under 42 U.S.C. § 1982 must prove that he or she is a member of a 'non-white race,'" Petition at i, nor did it hold that, under section 1982, "plaintiffs must show that they are members of a 'racially distinct group' that is 'commonly considered to be non-white.'" Petition at 11. Rather, the Fourth Circuit held that the Jewish plaintiffs could not base a section 1982 action for race discrimination on the subjective, irrational perceptions of the defendants. Specifically, the Court of Appeals held:

> Because discrimination against Jews is not racial discrimination, and the Supreme Court has stated that section 1982 does not address discrimination on account of religion or national origin, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968), we find that the district court properly dismissed the Congregation's section 1982 claim.

(A. at 7a.)[1/]

1/ "A" references are to pages of the Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

The Fourth Circuit's holding is consonant with the prior decisions of this Court and of the lower federal courts. This Court never has held that an action under section 1982 may be based on the subjective, irrational perceptions of individual defendants. Likewise, this Court never has held that a Jewish person may bring an action under section 1982 to challenge an act of discrimination. To the contrary, as noted by the Fourth Circuit, this Court has indicated that section 1982 "is not a comprehensive open housing law," and "does not address itself to discrimination on grounds of religion or national origin." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968).

The petitioners' reliance on the Jones decision in seeking this Court's review is perplexing in light of that decision's discussion of section 1982's limitations. The petitioners quote Jones for the proposition that, in order to give section 1982 the scope that its origins dictate, it must be accorded a sweep as broad as its language. Petition at 12. However, neither the origins of section 1982 nor its specific language support the petitioners' attempted extension of that statute to reach the facts in this case.

Section 1982 had its origin in the first section of the Civil Rights Act of 1866.[1/] Tillman v. Wheaton-Haven Recreation Association, 410 U.S. 431, 439 (1973). The constitutional basis for that statute, as originally enacted, was the Thirteenth Amendment, which abolished slavery. Section 1 of the Civil Rights Act of 1866 was enacted in an

---

1/ As noted in the Petition, sections 1981 and 1982 both originated in section 1 of the Civil Rights Act of 1866 and have been construed by this Court in a similar fashion. Petition at 11, n. 10, citing Runyon v. McCrary, 427 U.S. 160, 171 (1976).

effort to protect and extend the rights of the newly freed slaves. See Comment, Developments in the Law - Section 1981, 15 HARV. C.R.-C.L. L. REV. 29, 35-64 (1980). Nothing in the legislative origins of section 1982 supports its application to the desecration of a Jewish synagogue, regardless of whether the desecration was motivated by a Ku Klux Klan or Nazi inspired animus.

Furthermore, even the broadest interpretation of section 1982's language does not support application of that statute to these facts. Section 1982 provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

This Court has held that the statute originally was enacted "to protect a limited category of rights, specifically defined in terms of racial equality." Georgia v. Rachel, 384 U.S. 780, 791 (1966). It is hard to imagine how this statutory language could be extended to apply to acts of discrimination against Jews. Indeed, the total absence of cases in the lower federal courts under either sections 1981 or 1982 which involve discrimination against Jews reveals the unsupported nature of the petitioners' inventive argument.

The petitioners also quote Jones for the proposition that section 1982 "was meant to prohibit all racially motivated deprivations of the rights enumerated in the statute. . ." Petition at 13, n. 12, quoting Jones, supra at 426. The petitioners neglect to mention that the Jones decision addressed the question of whether section 1982 applies to private, as well as public, actions. Jones, supra at 413. It was in that context that this Court held that all racially motivated deprivations of rights, whether by public entities or by private individuals, were prohibited.

The petitioners' contention that the Fourth Circuit's decision conflicts with this Court's decision in McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) also is without merit. The petitioners correctly note that in McDonald, this Court held that section 1981 is applicable to racial discrimination against white persons, as well as non-white persons. The extensive discussion of the legislative history of the Civil Rights Act of 1866 in McDonald, id. at 287-296, emphasizes that the statute was intended to protect individuals of "every race and color." Id. at 287, quoting Cong. Globe, 39th Cong. 1st Sess. 211 (1866). Nowhere in the legislative history of the statute or in McDonald is there even a suggestion that the statute's coverage is based on a defendant's irrational, racial perceptions, rather than on an alleged difference in the treatment accorded individuals of different races.

In this case, the petitioners do not claim that they were treated differently because they were members of a different race. In fact, they do not even claim that Jews are members of a separate race. Rather, they claim that the desecration of their synagogue was motivated by the defendants' false perception that Jews are members of a different race. This Court never has indicated that such an allegation is covered by section 1982, and nothing in the legislative history of section 1982 supports such coverage.

If the Fourth Circuit had accepted the petitioners' theory for section 1982 liability, its decision would have conflicted with this Court's prior decisions holding that section 1982 does not encompass religious discrimination. By arguing that the respondents' irrational, racial perceptions may form the basis for a section 1982 action, the petitioners are attempting to find a back door for coverage of claims of

religious discrimination. Under the petitioners' theory, any plaintiff, whether Jewish, Catholic, Mormon, or any other creed, would be able to state a claim under section 1982 simply by alleging that the defendant who wronged him was motivated by an ill-conceived racial animus. Such a broad expansion of the coverage of the civil rights laws never has been condoned by this Court.

The Fourth Circuit recognized the undesirable practical effects which would result from the petitioners' proposed extension of section 1982's coverage. In his concurring opinion, Judge Murnaghan noted that the petitioners' legal theory would lead to myriad, federal civil rights suits arising out of various defendants' misperceived notions of the racial inferiority of others:

> Yet the law is grounded on facts, not on misperceptions of fact. For persons of the ilk which the defendants, at the present posture of the case, are revealed to be to have the power to confer jurisdiction on the federal courts would, in all probability, lead to very regrettable consequences.
>
> . . . .
>
> My ethnic origins are principally Hibernian. On March 17, for one group of Irish hotheads and on July 12 for another (as well as other dates during the year), violence deriving from misperceptions, of Catholics on the one hand, or of Protestants on the other, as an inferior human sort or race has broken out, to my everlasting regret from time to time. Yet it will but contribute to disruption of our nation to accord such ill mannered and unreasoned fracases the dignity of status as civil rights controversies. They belong in the state courts, where justice, more immediate and more personalized, is likely to be at hand.

(A. at 10a.)

As suggested by Judge Murnaghan and contrary to the petitioners' argument, adequate remedies for their injuries are available under state criminal and common law. The petitioners

contend that state criminal statutes provide no compensation for victims of crime. However, in Maryland, judges are free to, and often do, award criminal restitution. In fact, criminal restitution is available under Maryland law for the very crime of which the respondents herein were accused, malicious destruction of property. MD. ANN. CODE art. 27, § 640(b) (1985). See also MD. ANN. CODE art. 27, § 641(a) (1985). The petitioners apparently are dissatisfied with the punishment which was meted out to the respondents under Maryland criminal law. Despite that dissatisfaction, it is clear that a criminal remedy was available to them.

The petitioners also contend that state criminal and common law remedies are unacceptable because they ignore the deplorable motivation for the respondents' acts. Such is not the case. The injury to individual dignity resulting from the alleged anti-Semitic acts certainly would be considered by a criminal judge in sentencing the wrongdoers and awarding criminal restitution. Likewise, the egregious nature of the alleged acts would be central in the minds of a jury deciding what amount of punitive damages to award for state tort law violations. Such punitive damages are available for all of the pendent state tort claims in the Complaint. Bender v. Bender, 57 Md. App. 593, 598 (1984) (punitive damages may be awarded in trespass cases); Gorman v. Sabo, 210 Md. 155, 164 (1956) (punitive damages may be recovered in a private nuisance case); Sere v. Group Hospitalization, Inc., 443 A.2d 33, 37 (D.C.App. 1982) (punitive damages are available for intentional infliction of emotional distress).

Finally, the petitioners incorrectly declaim that state tort and common law remedies do not provide for injunctive relief. In fact, injunctive relief is available in both nuisance and trespass cases in Maryland. Adams v. Commissioners of Trappe, 204 Md. 165, 170 (1954).

Curiously, apart from alleging pendent claims for trespass, nuisance and intentional infliction of emotional distress in their federal suit, the petitioners never have sought to recover in state court for the wrongs that they suffered. Instead, the petitioners want to use the federal civil rights laws to send a message to wrongdoers whenever they arguably were motivated by irrational, racial perceptions. The Fourth Circuit was correct in concluding that the civil rights laws simply were not intended to cover every state law claim where the plaintiff alleges that the defendant was motivated by subjective, irrational perceptions of race. Accordingly, this Court should decline to review the Fourth Circuit's decision.

II. THERE IS NO CONFLICT BETWEEN THE FOURTH CIRCUIT'S DECISION AND A RECENT DECISION OF THE THIRD CIRCUIT.

In petitioning this Court for review of the Fourth Circuit's decision, the petitioners argue that the decision is in conflict with a contemporaneous decision of the Third Circuit. In fact, the two decisions are different. Although the Third Circuit permitted an Arab to allege that he was subjected to race discrimination under section 1981, there is no indication that the court would go so far as to permit Jews to state a claim under the civil rights laws.

In Al-Khazraji v. Saint Francis College, 784 F.2d 505 (3rd Cir. 1986), the Third Circuit held that an Arab plaintiff's section 1981 claim that he had been denied tenure because of "national origin, religion, and/or race," id. at 508, n. 4, could survive a motion for summary judgment. The court did not hold that a section 1981 claim can be based on religious discrimination. Instead, it emphasized the plaintiff's racial characteristics.

Like this Court in McDonald, the Third Circuit reviewed the legislative history of the Civil Rights Act of 1866 and noted that it was enacted to protect persons of "every race and color" from discrimination. Id. at 515-516. In grappling with the sometimes ephemeral distinction between race and national origin, the court stated:

> We believe that Congress' purpose was to ensure that all persons be treated equally, without regard to color or race, which we understand to embrace, at the least, membership in a group that is ethnically and physiognomically distinctive.
>
> . . . .
>
> While the distinction between racial discrimination, which is cognizable under Section 1981, and other types of discrimination, which may not be cognizable, may in some instances be obscure, that cannot justify refusing to attempt the distinction. Discrimination based on race seems, at a minimum, to involve discrimination directed against an individual because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens.

Id. at 517. Clearly, the Third Circuit did not base its description of the coverage of section 1981 on the subjective perceptions of the individual defendants, the standard urged by the petitioners herein. In fact, the court requires the very showing of ethnic and physiognomical distinctions to establish section 1981 coverage which the petitioners criticize.

The Third Circuit's decision is one of a series of decisions in the lower courts which have tried to evaluate whether discrimination on account of national origin ever constitutes race discrimination under the civil rights laws.[1/] This Court never has addressed that issue.

1/ For a discussion of the applicability of section 1981 to national origin employment discrimination cases, see Annot., 43 A.L.R. Fed. 103 (1979).

Furthermore, that issue is different from the issue presented by the petitioners. The Third Circuit certainly did not decide whether Jewish plaintiffs may bring a section 1981 action against defendants who injure them out of an irrational, anti-Semitic animus. To the contrary, the court's emphasis on the plaintiff's physical characteristics would preclude the petitioners from suing under the civil rights laws in the Third Circuit.

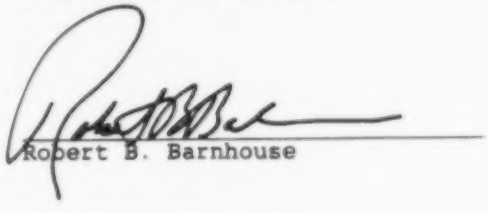
No federal court has extended the civil rights laws to encompass claims of religious discrimination because of the false racial perceptions of individual defendants. To the contrary, the lower courts that have been confronted with the claims of Jews under the civil rights laws have indicated that persons of the Jewish religion are not members of a group protected by section 1981. Wald v. International Brotherhood of Teamsters, 24 Fair Empl. Prac. Cas. (BNA) 616, 619 (C.D.Cal. 1980) (distinguishing Hispanic national origin cases, the court noted that the weight of authority supports the view that claims of discrimination against Jews do not fall within section 1981); Weiss v. Willow Tree Civic Association, 467 F. Supp. 803, 816 (S.D.N.Y. 1979) (the court rejected the section 1982 claim of a group of Hasidic Jews who, like the petitioners, sought to characterize their religious claim as a race claim); Budinsky v. Corning Glass Works, 425 F. Supp. 786, 788 (W.D.Pa. 1977) (the court noted that persons of Jewish origin are not protected by section 1981 because they are not commonly identified as a race nor subjected to the kind of racial discrimination which is the target of section 1981); Marlowe v. Fisher Body, Div. of General Motors Corp., 11 Fair Empl. Prac. Cas. (BNA) 1357 (E.D.Mich. 1975) (Jewish worker had no section 1981 claim because Jewishness is not a race).

Neither the Third Circuit decision in Al-Khazraji nor any other federal court decision has accepted the petitioners' theory for section 1982 coverage. That theory pushes the statute's coverage far beyond anything which previously has been recognized by the lower federal courts. Under the circumstances, this Court should deny the petition and refuse to review the Fourth Circuit's decision.

CONCLUSION

There is no compelling reason for this Court to exercise its jurisdiction by granting petitioners' writ of certiorari. This case was decided correctly by both the District Court and the Fourth Circuit. The decisions of this Court do not permit an action under section 1982 to be based on religious discrimination nor do they permit a section 1982 action to be based solely on the subjective, irrational perceptions of individual defendants. The Fourth Circuit's decision does not deprive the petitioners of a remedy for the wrongs which they have suffered because adequate state law remedies are available. Finally, there is no conflict among the circuits. No federal circuit court has held that the jurisdiction of the federal courts under the civil rights laws is determined by the misperceptions of defendants. For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

As a member of the Bar of this Court, I hereby certify that on this 5th day of September, 1986, a copy of the foregoing Brief of Michael David Remer in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and of the Motion for Leave to Proceed In Forma Pauperis was mailed, postage prepaid, to Patricia A. Brannan, Esquire, David S. Tatel, Esquire, Joseph M. Hassett, Esquire, and Steven P. Hollman, Esquire, Hogan & Hartson, 815 Connecticut Avenue, N.W., Washington, D.C. 20006, and to Irvin N. Shapell, Jewish Advocacy Center, Suite 512, 10400 Connecticut Avenue, Kensington, Maryland 20895, counsel for petitioners. A copy also was mailed to the following additional counsel and unrepresented respondents:

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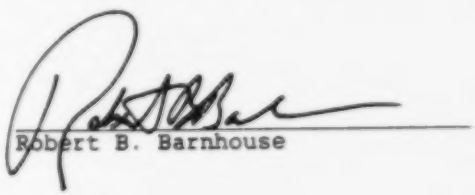
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No. 85-2156

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

v.

JOHN WILLIAM COBB, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE INTERNATIONAL NETWORK OF CHILDREN OF JEWISH HOLOCAUST SURVIVORS, AND THE AMERICAN GATHERING AND FEDERATION OF JEWISH HOLOCAUST SURVIVORS AS AMICI CURIAE SUPPORTING THE PETITION FOR WRIT OF CERTIORARI

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MOTION OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE INTERNATIONAL NETWORK OF CHILDREN OF JEWISH HOLOCAUST SURVIVORS, AND THE AMERICAN GATHERING AND FEDERATION OF JEWISH HOLOCAUST SURVIVORS FOR LEAVE TO FILE A BRIEF AMICI CURIAE

The Anti-Defamation League of B'nai B'rith, the NAACP Legal Defense and Educational Fund, Inc., the International Network of Children of Jewish Holocaust Survivors, and the American Gathering and Federation of Jewish Holocaust Survivors, pursuant to Rule 36.1, hereby move for leave to file the attached brief *amici curiae* supporting the petition for writ of certiorari. Consent to file the brief has been obtained from all of the petitioners and from the only two respondents who entered appearances in the court of appeals; letters expressing such consent have been lodged with the Clerk of this Court. Because the *amici* have been unable to obtain consent from the remaining

respondents, most of whom could not be located, this motion is necessary.

The background and concerns of the *amici* are fully set forth in the Interest of *Amici Curiae* section of the attached brief. In sum, the Anti-Defamation League and the NAACP Legal Defense Fund have sought for several decades to promote mutual understanding among all Americans and to combat racial and religious prejudice in the United States. During that period, each organization has appeared frequently before this Court as *amicus curiae* to advance constructions of the Constitution and federal civil rights laws that would ensure appropriate federal remedies for victims of racial, religious, and other forms of discrimination. The International Network and the American Gathering are organizations of Jewish survivors of the Nazi holocaust and their children.

The *amici* believe that the decision of the court below improperly deprives Jews and other minority group members of the protections afforded by section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982, and further compounds the confusion among the lower federal courts as to the proper scope of that statute. The *amici* organizations and their members bring to the issues raised in this case perspectives and experiences that are broader than and different from those of the petitioners. Accordingly, the *amici* respectfully seek the Court's leave to file the attached brief supporting the petition for certiorari.

Respectfully submitted,

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September 5, 1986

QUESTION PRESENTED

Whether Jews and other minority group members who do not belong to distinct "non-white races" but who are the victims of racially-motivated discrimination are entitled to seek relief under section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982.

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BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE INTERNATIONAL NETWORK OF CHILDREN OF JEWISH HOLOCAUST SURVIVORS, AND THE AMERICAN GATHERING AND FEDERATION OF JEWISH HOLOCAUST SURVIVORS AS AMICI CURIAE SUPPORTING THE PETITION FOR WRIT OF CERTIORARI

This brief is submitted on behalf of the Anti-Defamation League of B'nai B'rith, the NAACP Legal Defense and Educational Fund, Inc., the International Network of Children of Jewish Holocaust Survivors, and the American Gathering and Federation of Jewish Holocaust Survivors in support of the petition for writ of certiorari.

INTEREST OF AMICI CURIAE

B'nai B'rith, which was founded in 1843, is the oldest civic service organization of Jews in this country. The Anti-Defamation League of B'nai B'rith was formed in 1913, partially in response to the virulent anti-Semitism surrounding the Atlanta

trial of Leo Frank, *see Frank* v. *Mangum*, 237 U.S. 309, 349-50 (1915) (Holmes & Hughes, J.J., dissenting). Throughout its history, the Anti-Defamation League has pursued the objective set forth in its charter: "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against a..d ridicule of any sect or body of citizens." The Anti-Defamation League remains vitally interested in protecting the civil rights of all persons and in assuring that every individual receives equal treatment under the law regardless of his or her race, religion, or ethnic origin. One of the Anti-Defamation League's particular goals has been to combat and to remedy acts of anti-Semitic hatred and violence.

In support of its various objectives, the Anti-Defamation League has for several decades filed *amicus curiae* briefs in this and other courts. These briefs, including several dealing with the statute at issue in this case, have, as appropriate, urged the unconstitutionality or illegality of racially-discriminatory laws and practices and the provision of appropriate federal remedies to victims of such discrimination. *See, e.g., Bob Jones University* v. *United States*, 461 U.S. 574 (1983); *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

The Anti-Defamation League's interest in this case arises both from its general goals of promoting and securing tolerance and equal justice and from its history of fighting anti-Semitism. The decision of the court below, if left standing, would deprive victims of anti-Semitic conduct of an important federal civil rights remedy and add to the widespread confusion in the lower courts as to the availability of such a remedy to members of other minority or ethnic groups. Accordingly, the Anti-Defamation League appears as *amicus curiae* to urge this Court to grant the writ and reverse the decision of the court below.

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation established to assist black persons to secure their constitutional and civil rights. The Fund believes that Congress intended section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982, to protect any group which a defendant regards as different from and inferior to "white citizens." The bigotry and hatred that characterize anti-Semitism are indistinguishable in this regard from prejudice against blacks. The statute was enacted not to put the federal courts in the business of deciding which groups are and are not "white," but to condemn the very idea that there are legally cognizable differences between "whites" and other individuals. If, as the court of appeals below believed, an act of discrimination can be defended by proof that the victim was "really white," the federal courts will inevitably be required to determine the "race" of individuals of mixed parentage. Such government classifications may have been made by the Slave Codes and the Nuremberg Laws, but they are anathema under the first, fifth, and fourteenth amendments to the United States Constitution.

The International Network of Children of Jewish Holocaust Survivors, through affiliated groups in the United States, Canada, Israel, and Europe, represents five thousand sons and daughters of European Jews who survived the Nazi holocaust. Founded in 1981, the International Network is committed to fight against anti-Semitism and all other manifestations of racial, ethnic, and religious hatred and prejudice, and to prevent the recurrence of the holocaust in any form. The American Gathering and Federation of Jewish Holocaust Survivors, formally established in 1985, is an umbrella organization representing the interests of tens of thousands of survivors of the holocaust living in the United States. Among its principal purposes are the remembrance of the holocaust and the preservation of the culture of European Jewry.

REASONS FOR GRANTING THE WRIT

This case presents a square conflict among the circuits on a significant issue of federal statutory interpretation. The Fourth

Circuit panel below, over a vigorous dissent by Judge Wilkinson, held that section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982, only addresses acts of color-based discrimination and can never be invoked by Jewish plaintiffs because they are not members of a distinct "non-white race." Pet. App. A, at 7a. During the same week, the Third Circuit expressly rejected such a narrow construction of the statute and held that Caucasian victims of racially-motivated discrimination who are members of definable minority or ethnic groups are proper plaintiffs under the statute. *Al-Khazraji* v. *Saint Francis College*,784 F.2d 505, 516-17 (3d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3017 (U.S. July 2, 1986) (No. 85-2169). Starkly reflecting the extensive conflict among these and other circuit and district courts, the two recent decisions generated five separate opinions, each advancing a different legal theory. That fact alone confirms the need for Supreme Court guidance in this area.

The issue of statutory construction affected by this conflict is of considerable importance. Although relatively few incidents of discrimination of the type raised in this case may be affected by the circuits' differing views on the scope of the statute, each such incident has a devastating impact on its victims, their civil rights, and their communities. Even in the absence of a conflict among the circuits, that impact, which puts in jeopardy the fundamental values that Congress sought to protect in the statute, would be sufficiently important to warrant this Court's review for the purpose of correcting the decision below, which is inconsistent with prior decisions of this Court and with the statute's legislative history. Given the disarray among the lower federal courts on this subject, the grounds for granting review are compelling.

I. The Decision Below Conflicts With Numerous Decisions of Circuit and District Courts Regarding Whether the Civil Rights Act of 1866 Protects Various Minority and Ethnic Group Victims of Racially-Motivated Discrimination.

The decision below is one of dozens in recent years that have grappled with the question of whether various minority and

ethnic group members are protected by section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982.[1] The relevant statutory language addressed in these decisions extends to "all persons" various enumerated rights on the same terms as those rights are "enjoyed by white citizens."[2] Ten years ago, this Court held unambiguously that one need not be "non-white" to invoke the statute. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287 (1976). Prompted however by *McDonald's* dictum that the statute deals with discrimination that is racial in character, *id.*, the lower federal courts, in the intervening years, have devised numerous and conflicting tests by which the statute's coverage is withheld from or extended to various groups that may not technically qualify as distinct "non-white races." As a consequence of this disarray, the ability of minority and ethnic group members to obtain relief under the statute often depends principally on the jurisdiction in which they file suit.

The conflict among the circuits is plain and has been acknowledged by courts and commentators alike.[3] The existence

[1]Petitioners' complaint sought relief under sections 1981 and 1982. Presumably because their section 1981 claim was dismissed on alternative grounds, including the one at issue here, petitioners have sought review only of the lower courts' disposition of their section 1982 claim. Recognizing the congruence of the statutory language, legislative history, and decided cases for purposes of resolving the question presented, this brief does not distinguish between the two sections. Sections 1981 and 1982 both originated in section 1 of the Civil Rights Act of 1866. Where, as here, the relevant language is the same in both statutes, there is "no reason to construe these sections differently." *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973); *accord, Runyon* v. *McCrary*, 427 U.S. 160, 171 (1976).

[2]The "enjoyed by white citizens" language is common to sections 1981 and 1982. The phrase "all persons" appears in section 1981; section 1982 speaks of "all citizens."

[3]*See Ortiz* v. *Bank of America*, 547 F. Supp. 550, 559-64 (E.D. Cal. 1982) (referring to "profound disarray," citing dozens of cases, and describing three different and widely-used judicial approaches); Note, *National Origin Discrimination Under Section 1981*, 51 Fordham L. Rev. 919, 923-28 (1983) (pointing to "inconsistent approaches" among the lower federal courts and concluding that three different tests are being used); *see also* 2 J. Cook & J. Sobieski, *Civil Rights Actions* ¶ 5.09 (1985) (reviewing the contending lines of authority).

and scope of that conflict are amply illustrated by the majority and dissenting opinions of the Fourth Circuit panel below, Pet. App. A, the majority and concurring opinions of the Third Circuit in *Al-Khazraji* v. *Saint Francis College*, 784 F.2d 505 (3d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3017 (U.S. July 2, 1986) (No. 85-2169), and the Tenth Circuit's decision in *Manzanares* v. *Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979). As further explained below, these opinions confirm that if petitioners' lawsuit had been filed in either the Third or the Tenth Circuit, the result urged by the dissenting member of the Fourth Circuit panel would have obtained.

The panel below confronted a claim by petitioners that the desecration of their synagogue was racially motivated and thus actionable under sections 1981 and 1982. Petitioners' allegations of respondents' racial motivations were supported by uncontradicted admissions that respondents viewed Jews as racially distinct and inferior to white persons.[4] Nonetheless, a divided Fourth Circuit affirmed the district court's dismissal of the lawsuit and held that "discrimination against Jews is not racial discrimination" because Jews are not members of a "racially distinct group" that is "commonly considered to be non-white[]." Pet. App. A, at 6a-7a. In short, the panel held that Jews are not entitled to invoke sections 1981 and 1982 because they are not members of a distinct "non-white race" and hence cannot be the victims of "racial discrimination" by other whites.

Judge Wilkinson in dissent rejected the majority's view that a plaintiff must establish membership in a "non-white race." Instead, he concluded that the statute was designed to remedy the

[4]Because this case was decided on respondents' motion to dismiss, such allegations must be treated as true. Moreover, these factual allegations were substantiated by deposition testimony, affidavits, and other evidence placed in the district court record by petitioners. For purposes of the appeal in the Fourth Circuit, respondents conceded the accuracy of petitioners' "factual argument that the [respondents] perceived Jews as racially inferior." Brief for Appellees at 5, *Shaare Tefila Congregation* v. *Cobb* (4th Cir. 1986). Petitioners did not contend in their complaint that Jews constitute a separate race; instead, they focused on the racial motivations of respondents.

effects of conduct motivated by "racially discriminatory animus." Pet. App. A, at 13a; *see id.* at 12a, 14a. He would have held that petitioners were entitled to invoke the statute because they could demonstrate that the synagogue desecration was racially motivated. *Id.* at 14a-16a. Judge Wilkinson also would have allowed petitioners to proceed because there is a common *perception* among many that Jews constitute a separate race. *Id.* at 16a-17a, 20a. Judge Wilkinson relied heavily on Supreme Court precedent and the legislative history of the statute in concluding that the racial or racist character and motivation of the conduct, instead of the "non-white race" of the plaintiff, should be controlling. *Id.* at 13a-14a. In determining that racial motivation rather than racial identity should govern, he also noted the absence of a definitive, non-arbitrary concept of race by which to identify "appropriate" plaintiffs. *Id.* at 18a-19a.

At least two circuits, the Third and the Tenth, as well as many district courts, agree with Judge Wilkinson that a minority or ethnic group member need not establish his membership in a "non-white race" to invoke the statute. For example, the Third Circuit's recent opinion in *Al-Khazraji* v. *Saint Francis College*, *supra*, is squarely in conflict with the panel opinion below. In *Saint Francis College*, the plaintiff was an Arab who concededly belonged to the Caucasian race. 784 F.2d at 507, 514. The court nonetheless held that, even though he was "white," he was entitled under the Civil Rights Act to prove that he had been subjected to "racially-based prejudice." *Id.* at 517. Recognizing that race is an amorphous concept and that prejudice is often based on mistaken concepts of race, *id.*, the panel concluded, after examining the legislative history, that "race" was not used by members of the 39th Congress in a "crabbed fashion" and did not refer to narrow scientific categories of race. *Id.* at 516; *see also id.* at 520 (Adams, J., concurring). In sum, the Third Circuit departed from the Fourth Circuit's analysis both in holding that

Congress did not intend to limit the statute's protection to members of distinct "non-white races" and in emphasizing racial motivation rather than "scientific" racial identity. Under either approach, petitioners' claims undoubtedly would have survived a motion to dismiss in the Third Circuit.

Even more favorable to petitioners' position is the decision of the Tenth Circuit in *Manzanares* v. *Safeway Stores*, *supra*. There, Judge Seth ruled that the statute requires only that the plaintiff belong to an identifiable group subject to prejudice by the majority and that he allege discrimination because of his membership in that group. 593 F.2d at 970. The court criticized reliance on the plaintiff's racial identity, observed that the statutue does not even mention "race," and concluded that the statute could not be limited to racial discrimination in a technical or narrow sense. *Id*. at 970-71. The court held — without ruling that they are a racial group, that they are non-white in color, or that they are subject to racially-motivated prejudice — that "persons with Spanish surnames" form an identifiable group entitled to invoke section 1981. *Id*. at 970-72. Petitioners here obviously would have satisfied this test because of their membership in an identifiable minority group subject to discrimination.

As the discussion above indicates, the panel below employed a restrictive analysis at odds with at least two other circuits.[5] While the *Manzanares* and *Saint Francis College* cases do not specifically deal with Jewish plaintiffs,[6] the factual and legal

[5]A recent Sixth Circuit decision cited *Manzanares* with approval and allowed a section 1981 claim to proceed where it was shown that the defendant, who had used racist epithets, was racially motivated. *Erebia* v. *Chrysler Plastic Prod. Corp.*, 772 F.2d 1250, 1253-54 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1197 (1986). Although it does not precisely apply Judge Seth's rationale, the Sixth Circuit does not require proof of membership in a "non-white race." After an exhaustive review of the case law and a closely-reasoned analysis of the issue, the district court in *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 564 (E.D. Cal. 1982), expressly determined to follow the *Manzanares* approach. Numerous other decisions rejecting the position taken by the panel below are cited in *Ortiz*.

[6]Other than the lower court decisions in this case, there are few reported cases that directly confront the applicability of sections 1981 and 1982 to Jewish

analyses of those opinions clearly demonstrate that petitioners' claims would not have been dismissed in a jurisdiction applying those precedents. Such a conflict among the federal courts should not be permitted to persist, particularly where the attendant uncertainty inhibits the vindication of important federal civil rights. The writ should be granted to resolve this conflict.

II. The Decision Below is Inconsistent With This Court's Holding in *McDonald* v. *Santa Fe Trail.*

The court below affirmed the dismissal of petitioners' claims because Jews are not members of a "racially distinct group" that is "commonly considered to be non-white[]." Pet. App. A, at 7a. This Court has held, however, that one need not be "non-white" to state a claim under the statute. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287 (1976). Accordingly, the decision below cannot be squared with this Court's holding in *McDonald*.

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plaintiffs; none deals with the issue in a context where, as here, the racial animus of the defendant is conceded. In *Marlowe* v. *Fisher Body*, 4 Fair Empl. Prac. Cas. (BNA) 1160 (E.D. Mich. 1972), *later app. on other grounds*, 489 F.2d 1057 (6th Cir. 1973), the district court held that the Jewish plaintiff could invoke section 1981. The court noted that prejudice against Jews is not purely religious in character, but is racial as well. 4 Fair Empl. Prac. Cas. (BNA) at 1161. After trial, however, which proceeded on the agreed-upon theory that any discrimination was solely religious, the district court dismissed the section 1981 claim. 11 Fair Empl. Prac. Cas. (BNA) 1357, at 1361 (E.D. Mich. 1975). One district court decision in California, explicitly rejecting *Manzanares*, dismissed a Jewish plaintiff's section 1981 claim on the ground that Jews are not a race. *Wald* v. *International Brotherhood of Teamsters*, 25 Empl. Prac. Dec. (CCH) ¶ 31,497, at 18,993 (C.D. Cal. 1980). A more recent California district court decision embraced *Manzanares* and observed that discrimination against Jews is motivated by "racial prejudice" and that Jewish victims of discrimination should be allowed to invoke the statute. *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 567 & n.25 (E.D. Cal. 1982). A final case barring Hasidic Jews from invoking the statute is distinguishable because the overwhelming majority of the defendants were themselves Jewish and the apparent motivation for the alleged discrimination was based on Hasidic dress and lifestyle. *Weiss* v. *Willow Tree Civic Ass'n*, 467 F. Supp. 803, 816 & n.48 (S.D.N.Y. 1979).

In *McDonald*, the Court emphasized that "the statute explicitly applies to '*all* persons' (emphasis added), including white persons." *Id.* (emphasis and parenthetical in original). The statute's qualifying phrase, "as is enjoyed by white citizens," is designed not to limit the statute's applicability to non-whites, but rather "to emphasize the racial character of the rights being protected." *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966), *quoted in McDonald*, *supra* at 287. *Rachel* and its companion case, *City of Greenwood* v. *Peacock*, 384 U.S. 808 (1966), decided under the removal provisions of the 1866 Civil Rights Act, involved state criminal prosecutions of groups of black and white civil rights workers. It was the nature of the criminal offense, not the race of the criminal defendant, that the Court considered relevant in determining the availability of the federal remedy.

The same construction — one stressing the character of the rights being protected, rather than the "race" of the plaintiff — was also advanced in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), where the Court pointed out that "*all* racially motivated deprivations of the rights enumerated in the statute" are protected. *Id.* at 426 (emphasis in original). Indeed, once one accepts *McDonald's* holding that whites and non-whites alike can invoke the statute, racial *status* should become largely irrelevant and racial motivation and character should become the central issues. In the present case, the complaint alleged that the attack on the synagogue was racially motivated — that it occurred because of respondents' racial views. Thus, under controlling Supreme Court precedent, a claim for relief had been stated.

The panel below disregarded the holdings of this Court and refused to consider the racial character of the conduct and rights involved. Instead, looking solely to the race of the plaintiffs, it held that, since Jews are not "non-whites," no cause of action could be stated. That holding is directly contrary to the decisions of this Court in *McDonald* and the cases upon which the *McDonald* Court relied. It also conflicts with this Court's injunction that the statute be generously applied and that " 'ingenious analytical instruments' . . . [not be employed] to carve . . .

exception[s]" from the statute.[7] For these reasons, certiorari should be granted and the decision below corrected.

III. The Question Presented was Incorrectly Resolved by the Court Below.

Although this Court held twenty years ago in *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966), that section 1 of the Civil Rights Act of 1866 protects certain rights against infringement on account of thier "racial character," it has not yet had occasion precisely to define that term. The color-based definition chosen by the Fourth Circuit, "non-white," is plainly wrong. It contradicts both the legislative history of the Act and commonly accepted notions about race and racial discrimination.

A. The Legislative History Contradicts the Unduly Narrow Statutory Interpretation Adopted by the Court of Appeals.

In determining the "racial character" of the rights Congress intended to protect under sections 1981 and 1982, one must look first to the Act's legislative history. That history makes clear that the concept of "race" as understood and used by the 39th Congress was meant to encompass a far broader range of groups than just the "non-whites" protected by the court below.

In introducing the Civil Rights Act of 1866, Senator Trumbull described it as a bill designed "to protect all persons in the United States in their civil rights" and emphasized that it applied to "every race and color." Cong. Globe, 39th Cong., 1st Sess. 211 (1866). Representative Wilson, Chairman of the House Judiciary Committee and the bill's floor manager in the House, stressed that the measure would "protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the

[7] *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968) (quoting *United States* v. *Price*, 383 U.S. 787, 801 (1966)); *see also City of Memphis* v. *Greene*, 451 U.S. 100, 120 (1981) (statute's language to be "broadly construed"); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) ("narrow construction of the language . . . would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded").

enjoyment of the great fundamental rights which belong to all men." *Id.* at 1118.

While there can be no doubt that the Act was intended primarily to protect the rights of blacks, it is likewise clear that Congress did *not* intend to limit "race" by a color-based definition. In overriding President Johnson's veto of the Act, Congress reaffirmed that:

> "This bill, in that broad and comprehensive philanthropy which regards all men in their civil rights as equal before the law, is not made for any class or creed, or race or color, but in the great future that awaits us will, if it become a law, *protect every citizen, including the millions of people of foreign birth who will flock to our shores* to become citizens and to find here a land of liberty and law."

Id. at 1833 (emphasis supplied). As this passage demonstrates, sections 1981 and 1982 were never intended by Congress to apply solely to non-whites, but rather, as the statute provides, to "all persons" and "all citizens."

The term "race," as used in the debates, was meant to be given a broad meaning so that it would encompass every "class or creed, or race or color." *Id.* This broad meaning is evident in Representative Shallabarger's statement that:

> "Who will say that Ohio can pass a law enacting that no man of the German race, and whom the United States has made a citizen of the United States, shall ever own any property in Ohio . . . . If Ohio may pass such a law, and exclude a German citizen . . . because he is of the German nationality or race, then . . . you have the spectacle of an American citizen admitted to all its high privileges and entitled to the protection of his Government . . . and yet that citizen is not entitled to either contract, inherit, own property, work, or live upon a single spot of the Republic, nor to breathe its air."

Id. at 1294; *see also id.* at 1757 (noting President Johnson's objection that the bill would make citizens of "Chinese and Gypsies").

In addition, the more generalized comments in the legislative history about members of different "races" must be read in light of the common understanding of that term at the time.[8] A leading contemporary dictionary defined "race" as follows: "A race is the series of descendants indefinitely. Thus all mankind are called the *race* of Adam; the Israelites are of the *race* of Abraham and Jacob." N. Webster, *An American Dictionary of the English Language* 903 (C. Goodrich rev. Springfield, Mass. 1860) (emphasis in original). In addressing the meaning of racial terminology in another context, this Court has noted:

> "It is in the popular sense of the word, therefore, that we employ it as an aid to the construction of the statute, for it would be obviously illogical to convert words of common speech used in a statute into words of scientific terminology when neither the latter nor the science for whose purposes they were coined was within the contemplation of the framers of the statute or of the people for whom it was framed. The words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken."

United States v. *Bhagat Singh Thind*, 261 U.S. 204, 209 (1923). Against this background, the legislative history confirms that the Fourth Circuit's "scientific" limitation of the Act to "non-white races" is ill-founded and should be reviewed and reversed by this Court.

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[8]Conceptual and definitional problems associated with race are discussed more fully in Part III.B, *infra*.

B. Federal Remedies for Racially-Discriminatory Conduct Should not be Limited by Narrow and Arbitrary Definitions of "Race."

Respondents' desecration of petitioners' synagogue was racially motivated; it was prompted by respondents' belief that Jews are members of a distinct and inferior non-white race. *See* p. 6, n. 4, *supra*. Despite the uncontradicted evidence of the racist nature of the desecration, the panel below dismissed petitioners' claims because Jews in fact do not belong to a distinct non-white race. Pet. App. A, at 7a. The panel was correct in rejecting the notion that Jews are members of a scientifically distinct "race." However, the panel was plainly wrong in concluding that *its* enlightened notions of racial identity should be applied to restrict the availability of sections 1981 and 1982. Such a narrow interpretation of the statute's coverage ignores both the true character of racism and the inappropriateness of restrictive judicial definitions of race.[9]

Judge Seth has aptly observed that racists are "poor anthropologists" and that racial "[p]rejudice . . . . is based on all the mistaken concepts of 'race.' " *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979); *see also* Pet. App. A, at 11a (Wilkinson, J., dissenting); S. Washburn, *The Study of Race*, in *The Concept of Race* 243, 254 (A. Montagu ed. 1964). This connection between misbegotten notions of race and racial prejudice is a commonplace. But such misbegotten notions must not be ignored if the statute is to apply to "*all* racially motivated deprivations of . . . rights," *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968) (emphasis in original).

The panel below refused to permit petitioners to invoke the statute on the theory that respondents' "subjective, irrational perceptions" that Jews are a race should not be controlling. Pet. App. A, at 7a. This holding not only clashes with this Court's extension of the statute to "*all* racially motivated" conduct, it also

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[9]The *amici* reject the notion that Jews should be classified as members of a distinct "race," but, as is made clear throughout this brief, believe that the statute must be construed to cover acts of racism directed towards Jews.

ignores the fact that anti-Semitism has long been the product of racial misperceptions. The racist motivations of respondents are similar to the motivations that have animated anti-Semitic conduct for centuries.

A recent study of the character of anti-Semitism observed that:

> "In medieval times hostility to the Jew, whatever its underlying social or psychological motivations, was defined primarily in religious terms. From the fifteenth century onward this was no longer true, and Jew hatred was redefined, becoming at first partly, and then, at least in theory, wholly racial."

B. Lewis, *Semites and Anti-Semites* 81 (1986). The racist content of anti-Semitism, from at least the time of the Spanish Inquisition through Nazi Germany to present-day America, is a matter of historical record. *See id.* at 26-33, 81-100; T. Gossett, *Race: The History of an Idea in America* 9-12, 292-93, 371-72, 449 (1963); *see also* Pet. App. A, at 16a-17a (Wilkinson, J., dissenting); *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 567 (E.D. Cal. 1982). Six million Jews did not die in the holocaust as a result of differences in religious doctrine; they were the victims of an avowedly racist Nazi ideology that measured Jewishness by blood rather than belief. The panel below was mistaken in concluding that application of the statute to Jews would require it to indulge the isolated racist idiosyncracies of the individual respondents. The history of anti-Semitism amply, if not tragically, demonstrates its pervasive racist character.

Having refused to consider the racist motivations of respondents, the panel determined that since Jews are not a separate "non-white race" or not commonly thought of as one they are not entitled to invoke the statute. The test applied was explicitly based on skin color. In adopting such a racial test, the panel ignored the fact that "race" is not necessarily such a narrow concept and that for purposes of this statute a restrictive judicial "race test" is inappropriate.

There is no definitional consensus in the scientific or academic community about "race." *See generally* A. Montagu (ed.), *The Concept of Race* (1964) (collecting various scholarly essays on topic); *see also United States* v. *Bhagat Singh Thind*, 261 U.S. 204, 212 (1923); J. Barzun, *Race: A Study in Superstition* 203-07 (1965). Indeed, to the extent that there is agreement, it is on the proposition that the purpose of any racial classification dictates its scope and content. *See Ortiz* v. *Bank of America*, 547 F. Supp. 550, 565-67 (E.D. Cal. 1982); S. Molnar, *Races, Types, and Ethnic Groups* 13 (1975). In the lay community, "race" remains an extraordinarily open-ended concept; it is defined as broadly in today's leading dictionaries as it was over 100 years ago, when the Civil Rights Act was passed.[10]

Despite the fact that Jews should not be classified as a scientifically distinct "race," it is nonetheless also true that Jews are considered by many to constitute a "race." The mistaken belief that Jews belong to a separate "race" is not only held by anti-Semites; many with benign attitudes towards Jews often refer to them as a "race."[11] Indeed , a standard dictionary in America still illustrates its definitions of "race" with unfortunate references to the "Hebrew race" and the "Jewish race." *Webster's Third New International Dictionary* 1870 (1981).

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[10]*Compare Webster's Third New International Dictionary* 1870 (1981) ("descendants of a common ancestor" or "a class or kind of individuals with common characteristics, interests, appearance, or habits") *with* N. Webster, *An American Dictionary of the English Language* 903 (C. Goodrich rev. Springfield, Mass. 1860) ("the series of descendants indefinitely").

[11]A. Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* 353 (5th ed. 1974); *see, e.g., Hirabayashi* v. *United States*, 320 U.S. 81, 111 (1943) (Murphy, J., concurring) (wartime treatment of Japanese Americans "bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe."); *Near* v. *Minnesota*, 283 U.S. 697, 703 (1931) (Hughes, C.J.) ("Jewish Race"); I. Berlin, *Against the Current: Essays in the History of Ideas* 274-75 (1980) (describing Disraeli's theory of the "Jewish race"); Letter from Learned Hand to Charles H. Grandgent (Nov. 14, 1922), *reprinted in* L. Hand, *The Spirit of Liberty* 21 (3d ed. 1974) (urging that Harvard College not impose a "limitation based upon race" to restrict admission of Jews).

The panel below erred in dismissing out of hand the notion that Jews — because of the widespread, though mistaken, belief that they belong to a "race" — should be entitled to invoke the statute. It held in essence that victims of racial discrimination may invoke the statute only if the defendant's views on their racial identity coincide with those of society's most enlightened members. This holding ignores the contemporary and lay meanings of the term "race" and the express purpose of the statute. And such an abstract and restrictive reading of the statute would leave countless victims of discrimination plainly racist in character without any effective remedy.[12]

By refusing to consider the racial motivations of respondents or to accept the broader understanding of "race" prevalent at the time of the Act or in modern lay usage, the panel below left itself the task of devising a modern "scientific" definition of "race" and assumed the role of arbiter of racial classifications. In light of the absence of a scientific or academic consensus on either the propriety or the application of racial definitions, such a judicial role is inappropriate and will inevitably lead to arbitrary and restrictive classifications. It will likely result in unseemly inquiries into the racial background of litigants and the formulation of artificial and technical racial distinctions.[13] The breadth of the statute, however, renders such a definitional role unnecessary because of its sweeping prohibition of all racially-motivated discrimination. This Court therefore should reject the color-based test of the panel below and make it clear that a plaintiff need not "prove his

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[12]The racial animus displayed by respondents' conduct brings it within the terms of the statute in question and distinguishes it from situations involving religious discrimination in employment, housing, and public accommodations, which are in any event covered by other federal civil rights legislation specifically proscribing discrimination based on religion.

[13]*See* Note, *Legal Definition of Race*, 3 Race Rel. L. Rep. 571 (1958) (reviewing statutory definitions of racial groups and judicial interpretations thereof); *compare United States* v. *Bhagat Singh Thind*, 261 U.S. 204, 209-15 (1923) (high caste Hindu not a "free white person" for naturalization purposes) *with In re Mohan Singh*, 257 F. 209 (S.D. Cal. 1919) (reaching opposite result apparently undermined by the *Thind* case).

[racial] pedigree," *Al-Khazraji* v. *Saint Francis College*, *supra*, 784 F.2d at 517, before he is permitted to invoke a statute which by its terms protects "all persons."

CONCLUSION

For the foregoing reasons, the *amici* respectfully urge the Court to grant the writ.

Respectfully submitted,

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September 1986

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2156

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

vs.

JOHN WILLIAM COBB, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX

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CERTIORARI GRANTED OCTOBER 6, 1986

90 1P

JOINT APPENDIX*

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* * * *

* Omissions from the text of documents reprinted in part are indicated by asterisks. Certificates of Service have been omitted in printing.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

NO. R-84-880

SHAARE TEFILA CONGREGATION, *et al.*,
Plaintiffs,

v.

JOHN WILLIAM COBB, *et al.*,
Defendants.

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1984		
Mar 6	1	Complaint.
Mar 6	2	Summons Issued. (ccs. & Mag. Notice signed for by Counsel for Plaintiffs for Service). (Thomas Joseph Hunt, Jr. -- see pleading #3; Queen served 3/8/84; Remer (?) served 3/15/84; William Randall Harris served 3/7/84 -- see pleading #3) (Cobb served 7/11/84 -- see pleading #13) (William Hess served 8/16/84 -- see #15) (Raymond Jordan served 9/10/84 -- see #19)
Mar 26	3	Affidavits of service and attachments.
Mar 28	4	ANSWER of Defendant, Dominic Queen.

Apr 11	5	ANSWER of Defendant, William Randall Harris and CROSSCLAIM against all co-defendants.
Apr 16	6	Appearance of Joseph M. Niland, Esq., as attorney for Defendant, Dominic Queen. (c/s)
Apr 30	7	Motion of Aetna Casualty & Surety Company to Intervene; Points and Authorities; proposed Order and proposed Complaint. (c/s)
May 11	8	Response of Plaintiff to Motion of Aetna Casualty to Intervene. (c/s)
May 14	9	ORDER (Ramsey, J) "GRANTING" Aetna Casualty and Surety Company Leave to Intervene as Plaintiff. (c/m 5/14/84 jf) (see pleading #7)
Jun 1	10	Petition for appointment of counsel. (c/s)
Jun 4	11	ANSWER of Defendant, William Randall Harris, to Intervening Complaint; and CROSSCLAIM, against John William Cobb, Thomas Lloyd Heine, Lee Jordan, Domenic [*sic*] Queen, and Michael David Remer.
Jul 18	13	Affidavit of Service.
Aug 21	15	Affidavit of Service of William Hess.
Aug 22	17	Motion of Plaintiffs for Relief under Fed. R. Civ. P. 37(d); Memorandum; Affidavit, Attachment A through C, and proposed Order. (c/s)
Sep 7	18	Order (Ramsey, J.) "APPOINTING" Robert B. Barnhouse, Esquire as counsel for Defendant, Michael David Remer. (c/m 9/7/84 ph)

Sep 13	19	Affidavit of Service.
Oct 15	22	Memorandum and ORDER (Ramsey, J) that Defendant, Thomas J. Hunt, Jr., shall attend his deposition at a time, date, and place mutually agreed upon by the parties within 20 days after the date of this Order. (c/m 10/15/84 jf)
Oct 24	23	Motion of Plaintiff for Class Certification; Memorandum; Affidavit. (c/s)
Nov 28	26	Motion and Order (Ramsey, J.) extending the time within which Defendant, Michael Remer, shall respond to motion of Plaintiff for certification of Class to and including 20 days after decision made on the motion to dismiss. (c/m 11/28/84 ph)
Nov 28	27	Motion of Defendant, Michael David Remer, to Dismiss, and Memorandum. (c/s)
Dec 21	29	Opposition of Plaintiff to motion to dismiss, and attachments A thru H. (c/s)
1985		
Jan 29	31	Reply of Defendant, Remer, to Opposition by Plaintiff to Motion to Dismiss; Exhibit A and Request for Hearing. (c/s)
Mar 12	32	Motion of Plaintiff for leave to depose defendant, Michael David Remer, in prison, memorandum and proposed order. (c/s)
Mar 18	33	Supplemental Memorandum of Plaintiffs in support of Motion for Leave to depose Michael David Remer in prison. (c/s)
Mar 26	35	Opposition of Defendant, Michael David Remer, to Motion of Plaintiffs for leave to Depose Remer in Prison; proposed order. (c/s)

Apr 22	36	MEMORANDUM (Ramsey, J). (c/m 4/22/85) (E.O.D. 4/22/85 jf)
Apr 22	37	JUDGMENT (Ramsey, J) entered in favor of Defendants against Plaintiffs. (c/m 4/22/85) (E.O.D. 4/22/85 jf)
May 8	38	Notice of Appeal of Shaare Tefila Congregation, Rabbi Martin L. Halpern, Shirley Altman, William Harkaway, Marshall S. Levin, Maurice Potosky and Dr. Jacob Teller. (filing fee paid) (c/m 5/28/85 cmk)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1544

SHAARE TEFILA CONGREGATION, *et al.*,
Appellants,

v.

JOHN WILLIAM COBB, *et al.*,
Appellees.

RELEVANT DOCKET ENTRIES

DATE	FILINGS -- PROCEEDINGS
5/8/85	Notice of Appeal filed.
5/30/85	Case docketed. R[ecord] O[n] A[ppeal] filed. saw
8/1/85	Brief for Appellants and Appendix filed.
9/11/85	Brief for Appellees filed.
10/2/85	Reply Brief for Appellants filed.
11/5/85	Oral argument.
3/7/86	Opinions and Judgment entered.

3/28/86	Mandate issued.
7/3/86	Petition for Writ of Certiorari filed.
10/6/86	Supreme Court of the United States order granting certiorari on 10/6/86 filed. Case scheduled to be orally argued in tandem with Saint Francis College, et al. v. Majid Ghaican Al-Khazrahji [*sic*], etc. (Supreme Court No. 85-2169). mb (copy to panel).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. R-84-880

SHAARE TEFILA CONGREGATION, *et al.*
Plaintiffs,

v.

JOHN COBB, *et al.*,
Defendants

[Filed Sept. 7, 1984]

ORDER

IT IS HEREBY ORDERED, this 7th day of September, 1984, by the United States District Court for the District of Maryland, that Robert B. Barnhouse, Esquire, Piper & Marbury, 1100 Charles Center South, 36 S. Charles Street, Baltimore, MD 21201, be appointed to represent a defendant, Michael David Remer in the above-captioned case.

/s/ NORMAN P. RAMSEY
Norman P. Ramsey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. R-84-880

SHAARE TEFILA CONGREGATION, *et al.*,
Plaintiffs,

v.

COBB, *et al.*,
Defendants.

[Filed Nov. 28, 1984]

MOTION TO DISMISS

Michael David Remer, a defendant, by his attorneys, Robert B. Barnhouse and Deborah T. Garren, hereby moves this Court, pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, to dismiss the plaintiffs' Complaint and, as grounds therefor, states:

1. The Complaint fails to state a claim upon which relief can be granted under the "full and equal benefits" clause of 42 U.S.C. § 1981, inasmuch as claims of religious discrimination are not judicially cognizable under that statute.

2. The Complaint fails to state a claim upon which relief can be granted under the "full and equal benefits" clause of 42 U.S.C. § 1981, inasmuch as it fails to allege state action.

3. The Complaint fails to state a claim upon which relief can be granted under 42 U.S.C. § 1982, inasmuch as claims of religious discrimination are not judicially cognizable under that statute.

4. This Court lacks jurisdiction over the subject matter of this action under 42 U.S.C. § 1985(3) because the Com-

plaint fails to allege a conspiracy for the purpose of depriving the plaintiffs of rights guaranteed by federal law or the U.S. Constitution. First, the Complaint fails to allege any facts which show a violation of the plaintiffs' federal constitutional right to interstate travel. Second, the Complaint fails to allege violations of 42 U.S.C. §§ 1981 and 1982 because those provisions do not address religious discrimination. Third, the Complaint fails to allege a violation of the plaintiffs' First Amendment right to assemble and worship because it does not allege state action.

5. This Court lacks subject matter jurisdiction over the pendent state claims of trespass, nuisance and intentional infliction of emotional distress.

WHEREFORE, defendant prays that his Motion to Dismiss be granted.

In support of his motion, defendant submits a memorandum.

Respectfully submitted,

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ROBERT B. BARNHOUSE

/s/ DEBORAH T. GARREN
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[Certificate of Service Omitted
in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. R-84-880

SHAARE TEFILA CONGREGATION, *et al.*,
Plaintiffs,

v.

COBB, *et al.*,
Defendants.

[Filed Nov. 28, 1984]

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Michael David Remer, a defendant, by his attorneys, Robert B. Barnhouse and Deborah T. Garren, submits the following Memorandum in support of his Motion to dismiss, previously filed herein.

INTRODUCTION

On March 6, 1984, the plaintiffs filed this civil action which asserted a variety of federal and state claims allegedly arising from the defendants' desecration of the synagogue of the Shaare Tefila Congregation. The plaintiffs based their claims on several federal civil rights statutes, 42 U.S.C. §§ 1981, 1982, and 1985(3), and on the Maryland common law of trespass, nuisance, and intentional infliction of emotional distress. They sought jurisdiction over their claims under 28 U.S.C. §§ 1331 and 1343(a)(1) and (4); 28 U.S.C. §§ 2201 and 2202; and the principles of pendent jurisdiction.

ARGUMENT

I.

The Complaint fails to state a claim upon which relief can be granted under 42 U.S.C. § 1981 because that statute is inapplicable to discrimination on the basis of religion.

Count I of the plaintiffs' Complaint attempts to allege a cause of action under 42 U.S.C. § 1981, which provides, in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens* . . .

(Emphasis added.) Specifically, the plaintiffs allege that the desecration of their synagogue deprived them of "the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

Section 1981 had its origin in the first section of the Civil Rights Act of 1866. *Tillman v. Wheaton-Haven Recreation Association,* 410 U.S. 431, 439 (1973). At the time of that statute's enactment, the Thirteenth Amendment to the U.S. Constitution had been ratified, but the Fourteenth Amendment had not. Accordingly, the constitutional basis for § 1981, as originally enacted, was the Thirteenth Amendment, which provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

> Congress shall have power to enforce this article by appropriate legislation.

On several occasions, the Supreme Court has held that § 1981's prohibition against private acts of race discrimination is within Congress' power under § 2 of the Thirteenth Amendment. *Runyon v. McCrary,* 427 U.S. 160, 170, 179 (1976); *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273, 287-96 (1976).

Given its constitutional derivation in the Thirteenth Amendment's prohibition of slavery, it is not surprising that the courts uniformly have held that § 1981 is addressed solely to race discrimination. *Georgia v. Rachel,* 384 U.S. 780, 791 (1966); *Occhino v. Northwestern Bell Telephone Co.,* 675 F.2d 220 (8th Cir. 1982), *cert. denied,* 457 U.S. 1139 (1982); *Olivares v. Martin,* 555 F.2d 1192 (5th Cir. 1977); *Patterson v. American Tobacco Co.,* 535 F.2d 257 (4th Cir. 1976), *cert. denied,* 429 U.S. 920 (1976); *Waller v. Butkovich,* 584 F. Supp. 909 (M.D. N.C. 1984); *Saad v. Burns International Security Services, Inc.,* 456 F. Supp. 33 (D.D.C. 1978); *Baca v. Butz,* 394 F. Supp. 888 (D.N.M. 1975); *Easley v. Blossom,* 394 F. Supp. 343 (S.D. Fla. 1975); *Gradillas v. Hughes Aircraft Co.,* 407 F. Supp. 865 (D. Ariz. 1975); *Thomas v. Firestone Tire & Rubber Co.,* 392 F. Supp. 373 (N.D. Tex. 1975); *Marshall v. Plumbers & Steamfitters, Local 60,* 343 F. Supp. 70 (E.D. La. 1972); *Williams v. San Francisco Unified School District,* 340 F. Supp. 438 (N.D. Cal. 1972); *Ambrek v. Clark,* 287 F. Supp. 208 (E.D. Pa. 1968); *Swift v. Fourth National Bank of Columbus,* 205 F. Supp. 563 (M.D. Ga. 1962).

The Supreme Court has noted that § 1981 does not address religious discrimination. *Runyon v. McCrary, supra* at 167. The lower courts have agreed that claims of discrimination based on religion simply are not cognizable under § 1981. *Manzanares v. Safeway Stores, Inc.,* 593 F.2d 968 (10th Cir. 1979); *Khawaja v. Wyatt,* 494 F. Supp.

302 (W.D. N.Y. 1980); *Saad v. Burns International Security Services, Inc., supra; Turner v. Unification Church,* 473 F. Supp. 367 (D.R.I. 1978), *aff'd,* 602 F.2d 458 (1st Cir. 1979); *Reese v. Abbott Laboratories,* 493 F. Supp. 185 (N.D. Ill. 1978); *Mouriz v. Avondale Shipyards, Inc.,* 428 F. Supp. 1025 (E.D. La. 1977); *Balmes v. Board of Education of Cleveland City School District,* 436 F. Supp. 129 (N.D. Ohio 1977); *Schetter v. Heim,* 300 F. Supp. 1070 (E.D. Wis. 1969).

The Complaint in this case alleges essentially that plaintiffs were deprived of the full and equal benefit of the laws because of their Jewish faith. There is no allegation of racial discrimination, the only wrong which § 1981 was intended to address.

The plaintiffs have attempted to avoid § 1981's limited application to race discrimination by stating that "defendants perceive plaintiffs as racially distinct because they are Jews." Paragraph 19 of the Complaint. However, such a pleading artifice cannot bring their claim within a statute which clearly was not intended to address it. Section 1981 secures to all persons the same rights as are "enjoyed by white citizens." Both white and nonwhite citizens can be and are members of the Jewish religion. Jews simply are not members of a distinct race which the Thirteenth Amendment and § 1981 were designed to protect. Accordingly, Count I of the plaintiffs' Complaint, which alleges a cause of action under § 1981, must be dismissed.

II.

The Complaint fails to state a claim upon which relief can be granted under the "full and equal benefits" clause of 42 U.S.C. § 1981 because it fails to allege state action.

As noted above, Count I of the plaintiffs' Complaint attempts to allege a cause of action under the "full and equal benefits" clause of 42 U.S.C. § 1981. Specifically,

plaintiffs allege that the desecration of their synagogue deprived them of "the full and equal benefit of laws for the security of persons and property." Paragraph 19 of the Complaint. However, plaintiffs fail to claim any state involvement in the alleged deprivation. Since such state action is necessary to state a claim under the "full and equal benefits" clause of § 1981, Count I of the Complaint must be dismissed.

Among other things, § 1981 provides to all persons the same right "to make and enforce contracts" and "to the full and equal benefit of all laws . . . as is enjoyed by white citizens." Cases arising under § 1981 almost always address the "contracts" clause. For example, a plaintiff states a claim under the "contracts" clause of § 1981 when he alleges that defendants—whether public or private—have discharged him from employment or denied him admission to a school because of his race. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Runyon v. McCrary*, 427 U.S. 160 (1976).

On the other hand, cases arising under § 1981 rarely invoke the "full and equal benefits" clause. When plaintiffs do rely on that clause, they typically are challenging some sort of governmental action. *See, e.g., Graham v. Richardson*, 403 U.S. 365 (1971) (discrimination in government benefit programs); *Hall v. Pennsylvania State Police*, 570 F.2d 86 (3rd Cir. 1978) (racial discrimination in law enforcement); *Raffety v. Prince George's County*, 423 F. Supp. 1045 (D. Md. 1976) (racial harassment by police and fire department investigators); *Resident Advisory Board v. Rizzo*, 425 F. Supp. 987 (E.D. Pa. 1976), *modified*, 564 F.2d 126 (3rd Cir. 1977), *cert. denied*, 435 U.S. 908 (1978) (discrimination in public housing); *Lopez v. White Plains Housing Authority*, 355 F. Supp. 1016 (S.D. N.Y. 1972) (discriminatory housing regulations).

In recognition of the governmental emphasis of the "full and equal benefits" clause, several courts have stated that,

unlike the "contracts" clause, it does not reach private acts of discrimination. In *Mahone v. Waddle,* 564 F.2d 1018 (3rd Cir. 1977), *cert. denied,* 438 U.S. 904 (1978), the court distinguished the "full and equal benefits" clause from the "contracts" clause in one important respect. It noted that the right "to make and enforce contracts" was by nature concerned with relationships between private parties, and a prohibition against race discrimination in the private sector was readily implied. On the other hand, the Court stated:

> The words "full and equal benefit of all *laws and proceedings* for the security of persons and property" (emphasis supplied) . . . suggest a concern with relations between the individual and the state, not between two individuals. The state, not the individual, is the sole source of law, and it is only the state acting through its agents, not the private individual, which is capable of denying to blacks the full and equal benefit of the law. Thus, while private discrimination may be implicated by the contract clause of section 1981, the concept of state action is implicit in the equal benefit clause.

Id. at 1029.

The U.S. District Court for the Eastern District of Virginia recently adopted the *Mahone* court's interpretation of the "full and equal benefits" clause. In *Eggleston v. Prince Edward Volunteer Rescue Squad, Inc.,* 569 F. Supp. 1344 (E.D. Va. 1983), *aff'd,* 742 F.2d 1448 (4th Cir. 1984), the court dismissed the plaintiff's action, which challenged his expulsion from a private rescue squad under the "full and equal benefits" clause. It stated:

> In the instant case, . . . there is no State action in defendants' conduct in dismissing plaintiff from membership in the Rescue Squad. Thus no amount of expansive reading can generate a §

> 1981 claim relating to the "full benefit" . . . language.

Id. at 1353.

The Complaint in this case alleges that defendants' desecration of the synagogue "deprived plaintiffs of the full and equal benefit of laws." However, there is no state action involved in defendants' alleged conduct in desecrating the synagogue. Because no state action exists to support a claim under § 1981's "full and equal benefits" clause, Count I of the Complaint must be dismissed.

III.

The Complaint fails to state a claim upon which relief can be granted under 42 U.S.C. § 1982 because that statute is inapplicable to discrimination on the basis of religion.

Count II of the plaintiffs' Complaint attempts to allege a cause of action under 42 U.S.C. § 1982, which provides:

> All citizens of the United States shall have the same right, in every State and Territory, *as is enjoyed by white citizens* thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

(Emphasis added.) Specifically, the plaintiffs allege that the desecration of their synagogue deprived them of "the same right . . . as is enjoyed by white citizens . . . to . . . hold . . . real and personal property."

Section 1982, like 42 U.S.C. § 1981, had its origin in the first section of the Civil Rights Act of 1866. *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431, 439 (1973). At the time of that statute's enactment, the Thirteenth Amendment to the U.S. Constitution had been ratified, but the Fourteenth Amendment had not. Accordingly, the constitutional basis for § 1982, as originally en-

acted, was the Thirteenth Amendment, which abolished slavery. The Supreme Court has firmly established that § 1982's prohibition against private acts of race discrimination is within Congress' power under § 2 of the Thirteenth Amendment. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

Given its constitutional derivation in the Thirteenth Amendment's prohibition of slavery, it is not surprising that the courts uniformly have held that § 1982 is addressed solely to race discrimination. *Glover v. Tower*, 700 F.2d 556 (9th Cir. 1983); *Occhino v. Northwestern Bell Telephone Co.*, 675 F.2d 220 (8th Cir. 1982), *cert. denied*, 457 U.S. 1139 (1982); *Petrone v. City of Reading*, 541 F. Supp. 735 (E.D. Pa. 1982); *Fantroy v. Greater St. Louis Labor Council*, 478 F. Supp. 355 (E.D. Mo. 1979); *Patel v. Holley House Motels*, 483 F. Supp. 374 (S.D. Ala. 1979); *Smith v. Woodhollow Apartments*, 463 F. Supp. 16 (W.D. Okla. 1978); *Lee v. Minnock*, 417 F. Supp. 436 (W.D. Pa. 1976), *aff'd*, 556 F.2d 567 (3rd Cir. 1977); *Arnold v. Tiffany*, 359 F. Supp. 1034 (C.D. Cal. 1973), *aff'd*, 487 F. 2d 216 (9th Cir. 1973), cert. denied, 415 U.S. 984 (1974); *Cahill v. Cedar County*, 367 F. Supp. 39 (N.D. Iowa 1973), *aff'd*, 419 U.S. 806 (1974).

The Supreme Court has noted that § 1982 does not address religious discrimination. *Jones v. Alfred H. Mayer Co., supra* 413. Accordingly, no federal court has extended that statute to encompass claims of discrimination on grounds of religion. In *Weiss v. Willow Tree Civic Association*, 467 F. Supp. 803 (S.D. N.Y. 1979), the district court rejected the § 1982 claim of a group of Hasidic Jews who, like the plaintiffs in this case, sought to characterize their religious claim as a race claim. The Jewish plaintiffs in *Weiss* sued a civic association and its members for harassing them and delaying their establishment of a housing development. The court dismissed their § 1982 claim for failure to allege a racial animus, stating:

> While it is true that plaintiffs charge that defendants' conduct was directed against them because of "race and religion," the complaint makes it clear that the hard core of their charge is anchored to their religion, manner of dress and life style. Plaintiffs' gratuitous inclusion of the word "race" in an apparent effort to come within the *Mayer* ruling cannot down the true nature and essence of their complaint.

Id. at 816. *See also Schetter v. Heim,* 300 F. Supp. 1070 (E.D. Wis. 1969).

The Complaint in this case alleges essentially that plaintiffs were deprived of the right to hold real and personal property because of their Jewish faith. There is no allegation of racial discrimination, the only wrong which § 1982 was intended to address.

The plaintiffs have attempted to avoid § 1982's limited application to race discrimination by stating that "defendants perceive plaintiffs as racially distinct because they are Jews." Paragraph 21 of the Complaint. However, such a pleading artifice cannot bring their claim within a statute which clearly was not intended to address it. Section 1982 secures to all citizens the same right "as is enjoyed by white citizens" to hold real and personal property. Both white and nonwhite citizens can be and are members of the Jewish religion. Jews simply are not members of a distinct race which the Thirteenth Amendment and § 1982 were designed to protect. Accordingly, Count II of the plaintiffs' Complaint, which alleges a cause of action under § 1982, must be dismissed.

IV.

This Court lacks jurisdiction over the subject matter of this action under 42 U.S.C. § 1985(3) because the Complaint fails to allege a deprivation of rights guaranteed by federal law or the U.S. Constitution.

Count III of the plaintiffs' Complaint attempts to allege a cause of action under 42 U.S.C. § 1985(3), which provides, in pertinent part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons *of the equal protection of the laws, or of equal privileges and immunities under the laws;* . . . in any case of conspiracy set forth in the section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

(Emphasis added.) The plaintiffs allege that, by conspiring to desecrate the Shaare Tefila synagogue, the defendants conspired for the purpose of depriving them of "the equal protection of the laws, or of equal privileges and immunities under the laws." They base the alleged deprivation of their rights under § 1985(3) on "plaintiffs' federal constitutional right to travel, 42 U.S.C. §§ 1981 and 1982, plaintiffs' right to assemble and worship, Maryland criminal laws . . . and Maryland common law . . . ." Paragraph 23 of the Complaint. For the reasons discussed below,

plaintiffs have not stated a claim under § 1985(3) based on any of the above enumerated rights.

Section 1985(3) provides no substantive rights itself. It merely provides a remedy for certain preexisting federal rights — the rights to equal protection of the laws and equal privileges and immunities under the laws. *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366, 372 (1979).

The rights protected by § 1985(3) are limited to federal statutory and constitutional rights. Consequently, in order to state a claim under that section, plaintiffs must allege that the conspiracy was intended to deprive them of a right protected by federal law. *McNutt v. Duke Precision Dental & Orthodontic Laboratories, Inc.*, 698 F.2d 676 (4th Cir. 1983); *Holmes v. Finney*, 631 F.2d 150 (10th Cir. 1980); *Doski v. M Goldeseker Co.*, 539 F.2d 1326 (4th Cir. 1976); *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Wright v. Methodist Youth Services, Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981); *Johnston v. NBC, Inc.*, 356 F. Supp. 904 (E.D. N.Y. 1973); *Bellamy v. Mason's Stores, Inc.*, 368 F. Supp. 1025 (E.D. Va. 1973), *aff'd*, 508 F.2d 504 (4th Cir. 1974); *Grisom v. Logan*, 334 F. Supp. 273 (C.D. Cal. 1971); Rights owing their existence to state law simply are not protected under § 1985(3). *Miles v. Armstrong*, 207 F.2d 284 (7th Cir. 1953) (complaint which averred only state law violations did not state federal cause of action under § 1985(3)); *Hodge v. Stout*, 377 F. Supp. 131 (E.D. Tenn. 1974) (trespass does not rise to the level of a constitutional violation); *Ruark v. Schooley*, 211 F. Supp. 921 (D. Colo. 1962) (§ 1985(3) does not address violations of state law and the state constitution).

Since § 1985(3) protects only federal rights, the plaintiffs in this case cannot assert a § 1985(3) claim based on Maryland criminal and common law. The remainder of this ar-

gument discusses the viability of plaintiffs' § 1985(3) claims based on federal statutory and constitutional rights.

The Supreme Court has explicitly defined the scope of the federal cause of action made available by § 1985(3). Thus, in *Griffin v. Breckenridge,* 403 U.S. 88 (1971), it held that § 1985(3) reaches purely private conspiracies whenever they are aimed at depriving plaintiffs of rights protected by the Thirteenth Amendment or of the constitutional right to interstate travel. In *United Brotherhood of Carpenters and Joiners, Local 610 v. Scott,* ___ U.S.__ , 77 L.Ed.2d 1049 (1983), the Court indicated that its holding in *Griffin* does not extend beyond Thirteenth Amendment rights and the federal right to interstate travel. It held:

> . . . an alleged conspiracy to infringe First Amendment rights is not a violation of § 1985(3) unless it is proved that the state is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the state.

Id. at 1055. Under *United Brotherhood,* in order to state a § 1985(3) claim for deprivation of rights derived from the Fourteenth Amendment, plaintiffs must allege state action. *See also Cohen v. Illinois Institute of Technology, supra; Bellamy v. Mason's Stores, Inc.,* 508 F.2d 504, 506 (4th Cir. 1974).

The plaintiffs in this case have attempted to allege a cause of action under § 1985(3) based on three distinct federal rights: (1) the federal constitutional right to interstate travel, (2) 42 U.S.C. §§ 1981 and 1982, and (3) the First Amendment right to assemble and worship. When evaluated in light of the above case discussion, their § 1985(3) claims based on those rights must fail.

A. The Complaint fails to allege any facts which show a violation of the plaintiffs' federal constitutional right to interstate travel.

Count III of the Complaint contains nothing more than a conclusory allegation that the defendants' desecration of the synagogue interfered with plaintiffs' federal constitutional right to interstate travel. The plaintiffs have made no effort whatsoever to explain the facts which allegedly support a violation of that right. Such a conclusory allegation of a constitutional violation is not sufficient to state a § 1985(3) claim. *See Blackburn v. Fisk University,* 443 F.2d 121 (6th Cir. 1971); *Kadlec v. Illinois Bell Telephone Co.,* 407 F.2d 624 (7th Cir. 1969); *Kamsler v. Zaslawsky,* 355 F.2d 526 (7th Cir. 1966); *Dunn v. Gazzola,* 216 F.2d 709 (1st Cir. 1954); *Greene v. Johns Hopkins University,* 469 F. Supp. 187 (D. Md. 1979); *Everett v. City of Chester,* 391 F. Supp. 26 (E.D. Pa. 1975); *Wetherington v. Phillips,* 380 F. Supp. 426 (E.D. N.C. 1974), *aff'd,* 526 F.2d 591 (4th Cir. 1975).

In those cases which have permitted a § 1985(3) claim for deprivation of the right to travel interstate, the complaint alleges specific facts which show an interference with that right. For example, in *Griffin v. Breckenridge, supra* at 105-06, the Supreme Court noted that the plaintiffs could show a violation of the right to interstate travel by proving that the defendants' conspiracy impaired their right to travel the public highways in and about Kemper County, Mississippi, and drove out-of-state civil rights workers from the state. *See also Ward v. Connor,* 657 F.2d 45 (4th Cir. 1981) (conspiracy to deprive plaintiff of his civil rights by kidnapping him, holding him captive, and subjecting him to physical and psychological abuse clearly prevented plaintiff from traveling from state to state); *Cooper v. Molko,* 512 F. Supp. 563 (N.D. Cal. 1981) (plaintiff in deprogramming case, who alleged that he was coerced into leaving the state with his parents and prevented from returning to his co-religionists in California,

has alleged interference with the right to travel interstate); *Annot.*, 27 L.Ed.2d 862, § 9 (1971).

When plaintiffs fail to allege specific facts which support an interference with the right to interstate travel, their § 1985(3) claims are denied. For example, in *Hughes v. Ranger Fuel Corp.*, 467 F.2d 6, 10 (4th Cir. 1972), the court held that the plaintiffs' claim of interference with the constitutional right to travel was "manifestly spurious" because they did not allege any impediment to their right to travel over the public roads.

Like the *Hughes* plaintiffs, the plaintiffs in this case have failed to allege any facts which show that defendants impeded their right to travel over the public roads. Consequently, their § 1985(3) claim cannot be based on an interference with the constitutional right to travel interstate.

B. The Complaint fails to allege violations of 42 U.S.C. §§ 1981 and 1982 because those provisions do not address religious discrimination.

Count III of the Complaint alleges that defendants conspired to deprive plaintiffs of their rights under 42 U.S.C. §§ 1981 and 1982. However, plaintiffs have failed to state claims under those sections for the reasons discussed in Arguments I through III above. To reiterate, plaintiffs have failed to state a claim under 42 U.S.C. § 1981 because that statute does not address religious discrimination and because the Complaint fails to allege state action. Plaintiffs have failed to state a claim under 42 U.S.C. § 1982 because that statute does not address religious discrimination. Under the circumstances, plaintiffs' § 1985(3) claim cannot be based on §§ 1981 and 1982.

C. The Complaint fails to allege a violation of plaintiffs' First Amendment right to assemble and worship because it does not allege state action.

Finally, Count III of the Complaint alleges that defendants conspired to deprive plaintiffs of their First

Amendment right to assemble and worship. However, as noted above, the Supreme Court has held that a conspiracy to infringe First Amendment rights does not violate § 1985(3) in the absence of state action. Plaintiffs' complaint contains no allegation that the state was involved in the alleged conspiracy or that the alleged conspiracy was aimed at influencing the activity of the state. Since plaintiffs do not allege state action in connection with the conspiracy, their § 1985(3) claim cannot be based on the First Amendment right to assemble and worship.

To summarize Argument IV, in order to state a claim under § 1985(3), the plaintiffs must allege a violation of federal statutory or constitutional rights. Plaintiffs have failed to make such an allegation. They have alleged no facts which would support a violation of the constitutional right to interstate travel; they have failed to state a claim under 42 U.S.C. §§ 1981 and 1982; and they have failed to allege any state involvement in an infringement of the plaintiffs' First Amendment right to assemble and worship. Accordingly, Count III of the Complaint, which alleges a cause of action under § 1985(3), must be dismissed.

V.

This Court lacks subject matter jurisdiction over the plaintiffs' pendent state law claims of trespass, nuisance, and intentional infliction of emotional distress.

Counts IV, V, and VI of the plaintiffs' Complaint attempt to allege claims under Maryland state law for trespass, nuisance, and intentional infliction of emotional distress. If this Court grants the defendant's motion to dismiss the federal counts, it has no pendent jurisdiction to entertain the state claims. Absent an independent federal basis for the Court's exercise of subject matter jurisdiction, it cannot assert jurisdiction over pendent state claims.

In *United Mine Workers of America v. Gibbs,* 383 U.S. 715 (1966), the leading Supreme Court case on pendent jurisdiction, the Court stated:

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. *Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.*

(Emphasis added.) *Id.* at 726. Consistent with the above-quoted language, the Fourth Circuit and this Court both have declined to exercise pendent jurisdiction over state claims when all federal claims have been disposed of prior to a full trial on the merits. *Ancarrow v. City of Richmond,* 600 F.2d 443, 448 n. 5 (4th cir. 1979), *cert. denied,* 444 U.S. 992 (1979); *Sigmon v. Poe,* 564 F.2d 1093, 1096 (4th Cir. 1977); *O'Hara v. Kovens,* 473 F. Supp. 1161, 1167 (D. Md. 1979), *aff'd,* 625 F.2d 15 (4th Cir. 1980), *cert. denied,* 449 U.S. 1124 (1981). *See also* 13 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3567.1, at 133 n. 18-19 (1984).

In this case, the defendant has moved to dismiss all of the plaintiffs' federal claims contained in Counts I through III of the Complaint. In light of the principles of pendent jurisdiction discussed above, if the Court dismisses the first three counts of the Complaint, it must also dismiss the plaintiffs' pendent state claims.

CONCLUSION

For the reasons set forth above, the defendant's Motion to Dismiss the plaintiffs' Complaint should be granted.

Respectfully submitted,

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IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MARYLAND

Civil Action No. R84-880

SHAARE TEFILA CONGREGATION, *et al.*,
Plaintiffs,

v.

JOHN WILLIAM COBB, *et al.*,
Defendants.

[Filed Dec. 21, 1984]

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

On November 1, 1982, the synagogue of plaintiff Shaare Tefila Congregation was desecrated with spray-painted anti-Semitic slogans and symbols, including swastikas, a burning cross, the words "DEAD JEW," "DEATH TO THE JUDE," and "IN, TAKE A SHOWER JEW." Tab A and Attachments 1-6. Defendant Remer seeks dismissal of the Complaint in this action, brought by the victims of the desecration, on grounds that the federal civil rights acts do not reach his conduct. Because the Complaint states a claim under 42 U.S.C. §§ 1981, 1982 and 1985(3), the Motion to Dismiss should be denied.

I. PLAINTIFFS STATE A CLAIM UNDER 42 U.S.C. § 1981 BECAUSE DEFENDANTS' DESECRATION OF SHAARE TEFILA SYNAGOGUE WAS MOTIVATED BY RACIAL ANIMUS.

Section 1981 originated as part of the Civil Rights Act of 1866, which guarantees in pertinent part:

> all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and *to the full and equal benefit of all laws* and proceedings *for the security of persons and property* as is enjoyed by white citizens. . . .

42 U.S.C. § 1981 (1982). The Supreme Court has construed the phrase "as is enjoyed by white citizens" to emphasize the "racial character" of the rights being protected. *Georgia v. Rachel*, 384 U.S. 780, 791 (1966); *accord, McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287 (1976).

Defendant Remer's primary argument that plaintiffs are asserting a section 1981 claim "because of their Jewish faith" (Motion to Dismiss ["Motion"] at 5) rather than because of racial bias fundamentally mischaracterizes plaintiffs' Complaint and defendants' conduct. Plaintiffs intend to prove at trial that defendants' conduct was motivated by racial prejudice involving the false and abhorrent notion that Jews are a distinct and inferior race. As shown in part A below, the record already convincingly demonstrates that defendants were motivated by racial animus. In any event, as also shown in part A, the allegations of the Complaint are sufficient to entitle plaintiffs to make their showing at trial.

A. Plaintiffs' Complaint Sufficiently Alleges and the Record Shows that Defendants' Conduct Was Racially Motivated and Thus Is Cognizable Under Section 1981.

Defendant Remer's claim that plaintiffs' Complaint contains "no allegation of racial discrimination" (Motion at 5) is simply untrue. Under both the section 1981 and section 1982 counts of their Complaint, plaintiffs allege that "[d]efendants' desecration of the synagogue was motivated by racial prejudice. . . ." (Complaint, ¶¶ 19, 21.) It is this

racial prejudice which forms the basis for plaintiffs' causes of action under section 1981 and section 1982.

Defendant Remer's contention that defendants' acts on the night of November 1, 1982 are not cognizable under section 1981 because "Jews simply are not members of a distinct race" (Motion at 5) ignores the crucial element of a section 1981 claim—racial animus.[1] Even though plaintiffs are not members of a non-white race,[2] the racial animus requirement is satisfied if defendants are motivated by a *perception* that plaintiffs are racially distinct. *Garcia v. Gardner's Nurseries, Inc.*, 585 F. Supp. 369, 375 (D. Conn. 1984) (Hispanics of Puerto Rican descent are within protection of section 1981 because of perception that they are non-white); *Madrigal v. Certainteed Corp.*, 508 F. Supp. 310, 311 (W.D. Mo. 1981) (Mexican-American stated a valid claim under section 1981 because of racial perception). *Accord, Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 970-72 (10th Cir. 1979); *Petrone v. City of Reading*, 541 F. Supp. 735, 738 (E.D. Pa. 1982); *Ortiz v. Bank of America*, 547 F. Supp. 562-65 (E.D. Ca. 1982).

A "case-by-case" approach is appropriate to determine whether defendants' acts were in fact characterized by racial animus. *Carrillo v. Illinois Bell Telephone Co.*, 538 F. Supp. 793, 796 (N.D. Ill. 1982). *Accord, Lopez v. Sears,*

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[1] *See Apodaca v. General Electric Co.*, 445 F. Supp. 821, 823 (D.N.M. 1978) ("The courts . . . have allowed Spanish-surnamed plaintiffs the opportunity to plead, and attempt at . . . future trial to prove, that the discrimination against them was motivated by a racial animus."); *accord, Ortiz v. Bank of America*, 547 F. Supp. 550, 562 (E.D. Ca. 1982); *Lopez v. Sears, Roebuck, and Co.*, 493 F. Supp. 801, 807 (D.Md. 1980); *Enriquez v. Honeywell*, 431 F. Supp. 901, 906 (N.D. Okla. 1977).

[2] The Supreme Court has decided, after a lengthy examination of the legislative history of section 1981, that whites as well as non-whites may obtain relief under section 1981. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287-96 (1976). *See also Fiedler v. Marumsco Christian School*, 631 F.2d 1144 (4th Cir. 1980); *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979).

Roebuck and Co., 493 F. Supp. 801, 807 (D. Md. 1980). As one court has stated: "[T]he issues as to defendant's perception and animus are factual and are not to be determined by the court from the pleadings." *Apodaca v. General Electric Co.*, 445 F. Supp. 821, 823 (D. N.M. 1978).

In the present case, defendants' perception of Jews as a separate and inferior race is crystal clear. The slogans and symbols which defendants painted on the synagogue vividly reveal defendants' identification with anti-Semitic ideologies which hold as a basic tenet that Jews are not members of the "white race."[3]

The tragic legacy of Nazi Germany and the systematic killing of over six million Jews in the Holocaust was invoked by defendants' painting of swastikas, an eagle over a swastika, and the words "DEATH TO THE JUDE," "IN, TAKE A SHOWER JEW," "TOTEN KAMF RABAND" and "DEAD JEW" on the synagogue walls. *See* Tab A and Attachments 1-6. Earlier on the evening of November 1, 1982, defendants spray-painted the slogans "White Power" and "Arian [*sic*] Brotherhood" on a Drug Fair. It was at the Drug Fair that one of the defendants suggested: "Somebody should do that on a synagogue." Remer trial testimony (Tab B) at 57.

Discovery and investigation in this case, although not complete, already show that defendants were aware of the association of the words and symbols they painted with Nazi ideology. Defendants have identified the swastika as a Nazi symbol in sworn testimony. Remer trial testimony

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[3] That Nazism and other forms of anti-Semitism are motivated by racial prejudice has been judicially recognized. *See Banker v. Time Chemical, Inc.*, 579 F. Supp. 1183, 1186 (N.D. Ill. 1983) ("The vicious anti-Semitism directed against the Jews of Nazi Germany, for example, was racially motivated. . . ."); *Ortiz v. Bank of America*, 547 F. Supp. 550, 567 (E.D. Ca. 1982) ("The history of 'racial prejudice' against Jews throughout Europe and in this country appears to be so well known as almost not to require documentation").

(Tab B) at 53; Hunt testimony (Tab C) at 64, 92; Cobb testimony (Tab D) at 27; Heine testimony (Tab E) at 51. Defendants also have identified the eagle painted at the Drug Fair as a Nazi eagle. Hunt testimony (Tab C) at 61; Cobb testimony (Tab D) at 27; Heine testimony (Tab E) at 51; Queen testimony (Tab F) at 21.

Various defendants also recognize that the slogans painted on the synagogue refer back to the extermination of Jews during World War II. Defendant Hunt testified as follows:

* * * *

> Q. In Exhibit 8 you see a swastika and the words, "Dead Jew." I'd like to ask you what a swatiska next to the phrase, "Dead Jew," means to you.
>
> A. I don't know. I guess—it's symbolizing the Nazis, I guess, and then knowing what they did to the Jews, "Dead Jew" would probably go with a swatiska.
>
> Q. Tell me what they did to the Jews, please.
>
> A. Exterminated them.

Hunt testimony (Tab C) at 93-94.

Defendant Cobb also connected the slogans painted on the synagogue with Nazi activity during World War II:

> Q. The last exhibit, Exhibit J, has a picture. Can you tell me what that picture says?
>
> A. It says, "In" and "Take a shower Jew."
>
> Q. Do you know what the historical significance of take a shower Jew is?
>
> A. I guess that's how they executed some of the Jews in World War II.

Q. How?

A. I guess they made them take a shower and poisoned them or something, gassed them.

Cobb testimony (Tab D) at 58-59.

Defendant Heine testified similarly;

Q. What do you think about when you see the phrase, "Dead Jew?"

A. About the Holocaust.

Heine testimony (Tab E) at 76.

Various defendants also have testified that there was discussion among the defendants during the defacement of the Drug Fair and the synagogue about the Nazis. Defendant Cobb testified about comments made by defendant Remer:

Q. Were any of the defendants knowledgeable enough about Nazi Germany that they would know this word [Jude]?

A. The only person I could think of is Remer.

Q. How was he knowledgeable about Nazi Germany?

A. He talked about it a lot that night.

Cobb testimony (Tab D) at 55.

Defendant Heine also testified that defendant Remer talked about the Nazis during the course of the painting on November 1:

A. I don't know exactly what Michael Remer said, but he was saying something about some things that he was doing. But it had to do with Nazis and stuff. He was talking about like where it took place in the Holocaust or something. . . .

Heine testimony (Tab E) at 40. *See also id.* at 78.

A basic tenet of the Nazi Party in Germany was that Jews are not part of the white, or Aryan, race. Wolfe Declaration (Tab G) ¶ 7. This principle of the racial inferiority of Jews was stated in the Nazi Party Program of February 24, 1920 and incorporated into law by the Nuremberg Laws. *Id.* ¶ 7 and Attachments B and C. The basis for Hitler's virulent anti-Semitism and program to exterminate the Jews was the concept that Jews are racially distinct:

> The Jews has always been a people with definite racial characteristics and never a religion. . . .

A. Hitler, *Mein Kampf* (R. Manheim trans. 1943) 306.

> The foremost connoisseurs of . . . the possibilities in the use of falsehood and slander have always been the Jews; for after all, their whole existence is based on one single great lie, to wit, that they are a religious community while actually they are a race - and what a race!

Id. at 232.

> The Jewish state was never spacially limited in itself, but universally unlimited as to space, though restricted in the sense of embracing but one race. . . . It is one of the most ingenious tricks that was ever devised, to make this state sail under the flag of "religion," thus assuring it of the tolerance which the Aryan is always ready to accord a religious creed. For actually the Mosaic religion is nothing other than a doctrine for the preservation of the Jewish race. . . .

Id. at 150.

The Nuremberg Laws of September 15, 1935 and November 14, 1935 raised this notion to a legal command: Jews were declared a separate race and denied the rights

of German citizens. Wolfe Declaration (Tab G) ¶ 7 and Attachment C.

Neo-Nazi groups in this country adhere to the same warped view that Jews are not members of the white race.[4] For example, the National Socialist Party of America views itself as a successor to Hitler's National Socialist movement.[5] Among its "fundamental principles" is belief in "The Jew as the Ultimate Enemy." The official party newspaper expresses this principle in the following terms:

> The single serious enemy facing the White man is the Jew. The Jews are not a religion, they are an Asiatic *race*, locked in mortal conflict with Aryan man which has lasted for millennia, and which will continue until one of the two combat peoples is extinct.

The New Order, March 1979, at 3 (emphasis in original).

Neo-Nazi hate literature in the United States is rife with racist references to Jews. For example, *Aryan Nations*, the official publication of a neo-Nazi group of the same name, has exhorted its readers: "Aryans Awake! Jews are the Race of Satan!" *Aryan Nations*, No. 30 (1979), at 8.

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[4] One source of the view that Jews are not of the "White race" is a supposedly Bible-based two-seed theory, according to which Eve mated with two sexual partners who fathered her children:

> With Adam, her legitimate mate, Eve gave birth to the white race. With Satan as the father, Eve conceived Cain and a whole race of eternally damned devils. Those "children of Satan" are, of course, the Jews who, in different combinations and permutations, are related to every "mongrel" race in the world. (That is, every non-white.) And "white," as . . . the Neo-Nazis use the word, does not mean "Caucasian."

P. Lake, "Inside the American Nazi Party," *The Rebel*, January 30, 1984, at 47.

[5] The first "fundamental principle" of American National Socialism is "Acceptance of Adolf Hitler." *The New Order*, March 1979, at 3.

The magazine quoted a "Romanian patriot" named Corneliu Z. Codreanu to explain the program of the Aryan Nations movement:

> There is no hope for the White race, if it does not immediately come to the grim realization that the Jewish powers who presently rule over the Western nations desire and work toward the absolute destruction of White men everywhere. The Jews and their surrogates are aware of the tremendous regenerative capabilities of the Aryan race, and that is why they try to force mongrelization on the White race, especially in Britain and America: from racial bastardization there can be no hope of return to genetic purity and vitality.

Aryan Nations, No. 32 (1979), at 2, 7.

In perpetrating hate violence, neo-Nazis have identified Jews as targets because Jews are perceived as non-white. For example:

> [I]n Houston, Texas, in December, 1977, the local unit of the National Socialist White Workers Party, through its recorded telephone message, offered an award of $5,000 "for every non-white killed during an attack on a white person." Defending the award, Nazi spokesman Dennis Milem stated it was time "for an all-out war for whites against non-whites, and that includes Jews."

Anti-Defamation League of B'nai B'rith, 24 *Facts,* No. 2 (March 1978), at 7.

In sworn depositions, several defendants have testified to an understanding that the symbols and slogans painted by defendants on the Drug Fair and the synagogue are the products of an ideology that extols a superior race, a "white race," which excludes Jews. Defendant Hunt testified:

> Q. How familiar are you with the Nazi Party in Germany in the 1930's and '40's?
>
> A. Not familiar at all.
>
> Q. Do you know anything about their activities?
>
> A. Yeah, I do know, like I said, on TV you hear about them. I guess I must have learned about them in history class, you know. Everybody does. That there were Germans that wanted a superior race or something, you know, create - you hear about all these doctors and stuff like that trying to create a superior race. So the Nazis killed the Jews and stuff like that.

Hunt testimony (Tab C) at 66.

When asked why he thought a Jew seeing the phrase "Dead Jew" painted on a synagogue would feel uncomfortable, defendant Hunt replied: "It's an insult to your race.". Hunt testimony (Tab C) at 94.

Defendant Queen testified to his understanding that the slogan "Aryan Brotherhood" (painted by defendants on the Drug Fair as "Arian [sic] Brotherhood") reflected a Nazi racist ideology that excluded Jews from the "white race":

> Q. Do you understand what that ["Aryan Brotherhood"] means?
>
> A. Yes.
>
> Q. What does that mean to you?
>
> A. I guess the brotherhood of blonde hair, blue eyed people, I guess.
>
> Q. So, in other words, it would be the brotherhood of people, whites who are other than Jews?
>
> A. Yes.
>
> Q. Do you understand or know that the Ayran [*sic*] Brotherhood is associated with Nazism?

A. Yes.

Q. So that slogan is similar to what we discussed before with respect to white power, that it's a related notion?

A. Yes.

Q. That there is some superiority in Ayran [*sic*] people, meaning white non-Jews?

A. Yes.

Queen testimony (Tab F) at 21-22.

Defendant Heine offered the following explanation of Nazi racist ideology:

Q. Are you at all familiar with the rise of the Nazi Party in Germany in the 1930's?

A. Mm hm.

Q. Can you tell us what you know?

A. Not too well in depth, but from what I know from books, they wanted to develop a superior race. And that's all I know.

Q. Do you know what race that would be?

A. Well, they described it as being tall, white hair, and real muscular, I guess. That's basically what I hear.

Q. Do you know if that would include blacks?

A. I don't think it would. They wanted a specific race. They wanted a specific look for the race.

Q. Do you know if that would include Jews?

A. No, they were against Jews. That's what they didn't want, I guess.

Q. So you would say that the Nazi race is a different race from the Jewish race?

A. Yeah. Yes, I would.

Heine testimony (Tab E) at 52-53.

Defendant Cobb testified that defendant Remer spoke about the white race while he was defacing the Drug Fair:

> Q. To the right of that eagle is the term "Aryan brotherhood."
>
> A. That's what he [Remer] was talking about. I didn't know what it meant but that's what he was talking about, the white race or something like that.
>
> Q. How did Aryan [B]rotherhood and white race go together?
>
> A. I'm not sure. He was just talking about that. I don't even know what Aryan means.
>
> Q. But that term Aryan brotherhood suggests white race to you?
>
> A. Yes, from what I understand what Remer was talking about.
>
> * * *
>
> Q. Can you tell me what you remember of his [Remer's] conversation about the Jewish people?
>
> A. I don't know. I can't remember. He was saying about like the white race or something like that. . . .

Cobb Testimony (Tab D) at 29, 32.

In addition to Nazi slogans and symbols, defendants defaced the synagogue of Shaare Tefila Congregation with the words "Ku Klux Klan" and a burning cross, which is

the symbol of the Klan.[6] Like the Nazis, Klan members view Jews as racially distinct from whites. David Chalmers, one of the foremost authorities on the Ku Klux Klan, has attested that "a prevalent belief among the various Ku Klux Klan groups is that Jewish people are racially distinct from whites." Tab H, ¶ 5. This is supported by other studies:

> The fundamental theme of Klan ideology is the racist doctrine of "white supremacy," a concept that has motivated the hooded orders since their inception. It serves as justification for bigotry and violence against blacks, Jews, Hispanics, Orientals and other minorities.

Anti-Defamation League of B'nai B'rith, *Hate Groups in America: A Record of Bigotry and Violence,* at 17.

In *The Thunderbolt,* the official publication of the National States Rights Party, which is ideologically linked to the Klan, J.B. Stoner, the party's national chairman, distinguished Jews from whites:

> The negro [*sic*] is a violent enemy and he is a biological enemy because negro [*sic*] blood destroys White blood when the two are mixed together. However, the negro [*sic*] is not the enemy. The Jew is THE enemy of our White Race and the Jew is using the negro [*sic*] in an effort to destroy the White Race that he so passionately hates.

The Thunderbolt, October 1973.

Defendants have testified in depositions to their understanding of the anti-Semitic nature of Klan activity. Heine

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[6] Defendants have testified to their understanding that the burning cross is a symbol of the Ku Klux Klan. Hunt testimony (Tab C) at 71-73; Cobb testimony (Tab D) at 34; Heine testimony (Tab E) at 47. *See* Chalmers Declaration (Tab H) ¶ 6.

testimony (Tab E) at 46; Queen testimony (Tab F) at 19. Defendant Heine testified specifically to his understanding that the Klan views Jews as racially distinct:

> Q. Can you tell me anything else you know about the Klu [*sic*] Klux Klan?
>
> A. That's all I know of. Just what I've read and what obviously is known about them. That's all I know.
>
> Q. What is obviously known about them?
>
> A. They're prejudiced. *They're just against black people and Jewish people and I guess some other races or something.* But that's all I know of them.

Heine testimony (Tab E) at 47 (emphasis added).

In sum, the nature of the symbols and slogans painted on the synagogue by defendants, the history of those symbols and slogans as emblems of racial oppression of Jews, and defendants' realization of that history, are ample bases for a finder of fact to conclude that the desecration of the synagogue was the product of a racial animus against plaintiffs because they are Jews.[7]

Moreover, numerous courts have held that the mere allegation of discrimination motivated by racial character or

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[7] Because matters outside the pleadings are submitted with this Opposition, the Motion to Dismiss should be treated as one for summary judgment. Fed. R. Civ. P. 12(b). Under the standards in this Circuit, a motion for summary judgment "should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law." *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950). Summary judgment should be denied "even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Id.* The non-moving party is entitled to the benefit of all reasonable doubts concerning disputed facts and inferences. *Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *Cole v. Cole*, 633 F.2d 1083, 1089 (4th Cir. 1980).

racial animus is sufficient to withstand a motion to dismiss. For example, in *Lopez v. Sears, Roebuck, and Co.*, 493 F. Supp. 801 (D. Md. 1980), the court denied an employer's motion to dismiss a Hispanic-surnamed employee's section 1981 claim asserting discriminatory employment practices because "the plaintiff here has already alleged racial animus as a basis for suit." *Id.* at 807. Numerous decisions sustain section 1981 claims by members of ethnic or national origin groups which are not ordinarily perceived as racially distinct, provided the plaintiffs allege that the discrimination was "racial" in character. *See, e.g., Garcia v. Gardner's Nurseries, Inc.*, 585 F. Supp. 369 (D. Conn. 1984) (Puerto Rican-American); *Banker v. Time Chemical, Inc.*, 579 F. Supp. 1183 (N.D. Ill. 1983) (East Indian-American); *Pollard v. City of Hartford*, 539 F. Supp. 1156 (D. Conn. 1982) (Hispanic); *Tayyari v. New Mexico State University*, 495 F. Supp. 1365 (D. N.M. 1980) (Iranian); *Khawja v. Wyatt*, 494 F. Supp. 302 (W.D. N.Y. 1980) (Pakistani-American); *Apodaca v. General Electric Co.* (D. N.M. 1978) (Spanish-surnamed American); *Budinsky v. Corning Glass Works*, 425 F. Supp. 786 (W.D. Pa. 1977) (Slavik-American); *Cubes v. Rapid American Corp.*, 420 F. Supp. 663 (E.D. Pa. 1976) (Cuban-American).

In addition, Chief Judge Kaufman of this Court entered an Order on a Motion for Default Judgment in *Tolson v. Aicheson*, Civ. No. K-78-1120, holding that defendant's conduct in burning crosses on the property of a black family, Beth Torah Congregation and the B'nai B'rith Hillel Foundation at the University of Maryland violated 42 U.S.C. §§ 1981, 1982 and 1985(3), among other statutes. Order of April 21, 1982. The injunctive relief ordered by Judge Kaufman prohibited defendant from further acts of harassment on the property of Jewish persons and congregations as well as that of blacks. *Id.*

Plaintiffs' allegations that defendants' acts were motivated by racial discrimination must be taken as true in ruling on this Motion to Dismiss. *Gladstone, Realtors v.*

Village of Bellwood, 441 U.S. 91, 115 (1979). What defendant Remer dismisses as a "pleading artifice" (Motion at 5) is in fact a judicially recognized basis for relief under section 1981.

B. State Action Need Not Be Alleged in Order to State a Claim Under 42 U.S.C. § 1981.

Contrary to defendant Remer's assertion in paragraph 2 of the Motion to Dismiss, there is no requirement of "state action" to make out a claim under the "full and equal benefits" clause of 42 U.S.C. § 1981. This point of law is controlled by the holdings in *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968) and its progeny.

In *Jones,* white defendants had refused to sell black plaintiffs a home on racially-motivated grounds. At issue in *Jones* was whether Congress intended in enacting section 1 of the Civil Rights Act of 1866 (the predecessor statute of sections 1981 and 1982) to prohibit only governmental interference with the civil rights protected by that statute, or whether it also sought to prohibit private racially-motivated acts.[8] The Court reviewed the congressional debates over the Act of 1866, and found abundant and conclusive evidence that Congress' legislative intent

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[8] Section 1 provided, in pertinent part:

> [A]ll persons . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other. . . .

Act of April 9, 1866, c.31, § 1, 14 Stat. 27.

The evolution of section 1 of the Civil Rights Act of 1866 into the present-day sections 1981 and 1982 is explained in *Jones,* 392 U.S. at 422 n.28; *Tillman v. Wheaton-Haven Recreation Ass'n,* 410 U.S. 431, 439-40 n.11 (1973); and *Runyon v. McCrary,* 427 U.S. 160, 168 n.8 (1976).

embraced prohibition of private actions which transgressed the rights listed in section 1 of the Act. 392 U.S. at 427-36. The *Jones* Court concluded:

> In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act [of 1866] was designed to do just what its terms suggest: to prohibit all racial discrimination,whether or not under color of law, with respect to the rights enumerated therein. . . .

392 U.S. at 436.

The rights enumerated in the Act of 1866, contained in Section 1, include the right "to full and equal benefit of all laws . . . for the security of person and property." The rights now protected by sections 1981 and 1982 were enumerated, seriatim, in one sentence of section 1 of the Act of 1866. The defendant's assertion that state action is a necessary component of a claim arising under one of the rights enumerated by Congress is inconsistent with the *Jones* Court's conclusion that "§ 1 [of the Act] was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute," 392 U.S. at 426 (emphasis by the Court).

Since *Jones,* the Supreme Court has consistently reaffirmed its conclusion that Congress intended to protect the rights specified in section 1 of the Civil Rights Act of 1866, now codified in 42 U.S.C. §§ 1981 and 1982, against private as well as governmental actions. *See Runyon v. McCrary,* 427 U.S. 160, 173 (1976) ("[The view] that § 1981 does not reach private acts of racial discrimination is . . . wholly inconsistent with *Jones'* interpretation of the legislative history of § 1 of the . . . Act (citations omitted). And this consistent interpretation of the law necessarily requires the conclusion that § 1981, like § 1982, reaches private conduct"); *Johnson v. Railway Express Agency,* 421 U.S. 454, 459-60 (1975) (section 1981 affords

a federal remedy against racial discrimination in private employment); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 435, 439-40 (1973) (section 1982 reaches beyond state action, and sections 1981 and 1982 should be construed together since they are both traceable to section 1 of the Act); *District of Columbia v. Carter*, 409 U.S. 418, 422 (1973) (since the dangers of private discrimination were a focal point of Congress' concern in the 1866 Act, section 1982 applies to all racial discrimination in the sale or rental of property); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 237 (1969) (a narrow construction of a right enumerated would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by section 1 of the Act).[9]

There is considerable authority from federal district courts which have faced the issue that state action is not required to state a claim under the "full and equal benefits" clause of section 1981.[10] *See Vietnamese Fishermen's*

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[9] In an analogous civil rights context, the Supreme Court noted that equal protection of the laws can be impaired as effectively by private actors as by the state. In *Griffin v. Breckenridge*, 403 U.S. 88 (1970), in construing whether purely private conspiracies might constitute deprivations of "the equal protection of the laws, and equal privileges and immunities under the laws" under section 1985(3), the Court wrote:

> [T]here is nothing inherent in the phrase [equal protection of the laws] that requires the action working the deprivation to come from the State (citation omitted). Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985(3) of *all* deprivations of "equal protection of the laws" and "equal privileges and immunities under the laws," whatever their source.

403 U.S. at 97.

[10] Defendant Remer asserts that cases arising under the "equal benefits" clause "typically' are challenging some sort of governmental action, and notes five such cases. (Motion at 6-7.) None of the cited cases holds, nor could such a case properly hold under *Jones* and its progeny, that there is a "state action" limitation on claims arising under the "full and equal benefits" clause.

Ass'n v. Knights of Ku Klux Klan, 518 F. Supp. 993, 1008 (D. Tex. 1981) ("[i]t is well established that the 'full and equal benefit of all laws' guarantee of § 1981 applies to private action"); *Hernandez v. Erlenbusch*, 368 F. Supp. 752, 755 (D. Or. 1973); *Central Presbyterian Church v. Black Liberation Front*, 303 F. Supp. 894, 897-901 (E.D. Mo. 1969); *Gannon v. Action*, 303 F. Supp. 1240, 1245 (E.D. Mo. 1969), *modified on other grounds*, 450 F.2d 1227, 1238 (8th Cir. 1971).

In support of the theory that state action must be alleged in this case, Remer cites dictum from *Mahone v. Waddle*, 564 F.2d 1018 (3rd Cir. 1977), *cert. denied*, 438 U.S. 904 (1978). *Mahone* was a state action case, however, *id.* at 1030. Moreover, the *Mahone* approach is plainly at odds with the Supreme Court's discussion in *Jones* of the history of the Act of 1866 and its conclusion that the Act "was designed to . . . prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein." 392 U.S. at 436. This Court is bound by the Supreme Court's construction of the Civil Rights Act of 1866 in *Jones*, which noted that "history leaves no doubt that, if we are to give [the law] the scope that its origins dictate, we must accord it a sweep as broad as its language" (citation omitted). 392 U.S. at 437.[11]

The *Mahone* court simply erred in drawing the summary conclusion that only the state is capable of denying indi-

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[11] The other principal authority cited by defendant Remer in support of the "state action" theory, *Eggleston v. Prince Edward Volunteer Rescue Squad, Inc.*, 569 F. Supp. 1344 (E.D. Va. 1983), *aff'd*, 742 F.2d 1448 (4th Cir. 1984), simply applies the *Mahone* dictum, without offering any additional analysis or support. The Fourth Circuit in its unpublished opinion affirming the district court expressly declined to reach the state action issue. Slip op. at 4. Like *Mahone*, *Eggleston* is inconsistent with *Jones* and its progeny.

viduals the full and equal benefit of the law.[12] Private racially motivated violations of laws that are enacted "for the security of persons and property" necessarily deprive the victims of the full and equal benefit of those laws. Even if the state enacts and enforces laws in a non-discriminatory manner, the fact remains that the victims have suffered a loss of the full and equal benefits that the laws are intended to provide. Specifically, in this case, the racially-motivated trespass and other acts committed by the defendants caused extreme mental and emotional distress to the plaintiffs and damage to the plaintiffs' property. This distress and damage, although caused by private persons, constitutes a deprivation of the full and equal benefit of laws for the security of persons and property.

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[12] The *Mahone* decision has been criticized on this basis in the course of an analysis of section 1981 jurisprudence:

> Congress intended the *entire* Civil Rights Act of 1866 to apply to private conduct. There is no historical basis for imposing a state action requirement on selected portions of the statute, especially since they comprise a single sentence. . . .
>
> The inferences to be drawn from the statutory language are not so clear as the *Mahone* court suggests. Accepting the premise that the state is the sole *source* of law does not necessarily lead to the conclusion that only the state can *deprive* a citizen of the equal benefit of the laws. A government may establish "laws and proceedings" that are fair as between all citizens, but a private individual can interfere with this equality so as to prevent another from enjoying the full and equal benefit of those laws. . . .[P]rivate citizens can and do deprive each other of the full and equal benefit of the laws. . . .

Comment, *Developments in the Law - Section 1981,* 15 Harv. C.R.-C.L.L. Rev. 29, 136, 138 (1980) (emphasis in original) (footnotes omitted).

II. PLAINTIFFS STATE A CLAIM UNDER 42 U.S.C. § 1982 BECAUSE DEFENDANTS' DESECRATION OF THE SYNAGOGUE OF SHAARE TEFILA CONGREGATION WAS MOTIVATED BY RACIAL ANIMUS.

Defendant Remer makes the identical argument against the application of section 1982 to the present case as he made against the application of section 1981. (Motion at 9-12.) By its terms, section 1982 guarantees the right to "hold . . . real and personal property" and, like section 1981, refers to protection of rights "enjoyed by white citizens." Because of this similar language and the fact that both sections 1981 and 1982 originated in section 1 of the Civil Rights Act of 1866, courts have construed the sections in a similar fashion. The Supreme Court declared that "[i]n light of the historical interrelationship between § 1981 and § 1982 [there is] no reason to construe these sections differently. . . ." *Runyon v. McCrary,* 427 U.S. 160, 171 (1976), quoting *Tillman v. Wheaton-Haven Recreation Ass'n,* 410 U.S. 431, 440 (1973). *Accord, McCrary v. Runyon,* 515 F.2d 1082, 1087 (4th Cir. 1975). Consequently, defendant Remer's arguments against the application of section 1982 to the present case must fail for the same reasons that his argument against the application of section 1981 fails. *See* part I.A., *supra.*

As with their cause of action under section 1981, plaintiffs' cause of action under section 1982 is not based upon religious discrimination. It is based upon racial discrimination. Although defendant Remer contends that plaintiffs' Complaint contains "no allegation of racial discrimination" (Motion at 11), the contention is simply untrue. Plaintiffs' Complaint explicitly states in the section 1982 count that "[d]efendants' desecration of the synagogue was motivated by racial prejudice in that defendants perceive plaintiffs as racially distinct because they are Jews." Complaint, ¶ 21. Because the slogans and symbols sprayed on the walls of the synagogue are prod-

ucts of racial animus, defendants' acts are cognizable under section 1982, which protects plaintiffs' right to hold real property.[13]

The two major cases which defendant Remer cites in support of his argument against the applicability of section 1982 to the present case are inapposite. (Motion at 11-12.) In *Weiss v. Willow Tree Civic Ass'n,* 467 F. Supp. 803 (S.D.N.Y. 1979), Hasidic Jews brought suit alleging violations of section 1982 and section 1985(3) against a civic association for harassing them and delaying their attempt to establish a housing development. Although plaintiffs' complaint alleged that defendants' conduct was directed against them because of "race and religion", plaintiffs did not allege or offer in opposition to the motion to dismiss any specific facts indicating that the discrimination against them was racial in character. There was no showing in *Weiss,* as there has been in this case, of the extent to which the conduct of defendants was based on a perception of Jews as a distinct and inferior race. Similarly, the plaintiff in *Schetter v. Heim,* 300 F. Supp. 1070 (E.D. Wis. 1969) failed to allege any racial discrimination whatsoever. *Id.* at 1073.

Because it is racial prejudice which forms the basis for plaintiffs' cause of action under section 1982, as evidenced by the facts set forth in part I.A. above, plaintiffs have stated a valid claim under section 1982.

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[13] Acts of racial discrimination occurring on the property of a house of worship are cognizable under section 1982. *See Gannon v. Action,* 303 F. Supp. 1240 (E.D. Mo. 1969), *aff'd in part and remanded in part on other grounds,* 450 F.2d 1227 (8th Cir. 1971) (disruption of religious services of a predominantly white parish by an organized black group violated section 1981 and section 1982); *Central Presbyterian Church v. Black Liberation Front,* 303 F. Supp. 901 (E.D. Mo. 1969) (similar holding).

III. PLAINTIFFS STATE A CLAIM UNDER 42 U.S.C. § 1985(3) BECAUSE DEFENDANTS CONSPIRED TO DENY PLAINTIFFS OF THE EQUAL PROTECTION OF THE LAWS OR EQUAL PRIVILEGES AND IMMUNITIES UNDER THE LAWS.

Count III of plaintiffs' Complaint states a cause of action under 42 U.S.C. § 1985(3), which provides a remedy to victims of a conspiracy to deprive them of the equal protection of the laws or equal privileges and immunities under the laws. The Supreme Court in *Griffin v. Breckenridge*, 403 U.S. 88 (1971) established a four-part test which plaintiffs must satisfy to present a valid claim under section 1985(3). Plaintiffs must allege and prove: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) whereby a person is either (a) injured in his person or property, or (b) deprived of any right or privilege of a citizen of the United States. 403 U.S. at 102-03. Defendant Remer challenges only the sufficiency of plaintiffs' allegations to meet part (2) of the *Griffin* test.

In order to satisfy part (2) of the *Griffin* test, a claimant must demonstrate that certain independent or "predicate" rights have been violated. Plaintiffs have alleged, and are prepared to prove, the violation of predicate rights derived from the federal Constitution, federal statutes, and state law. Because plaintiffs have presented a colorable claim under all three sources of right, as more fully set forth below, the motion to dismiss must be denied.

A. Plaintiffs Have Stated a Section 1985(3) Claim for Violation of Their Federal Constitutional Right to Interstate Travel.

Federal constitutional rights clearly are adequate predicate rights in a section 1985(3) action. *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366,

370 n.6 (1979). The right to travel has been recognized as a basic constitutional right secured against violation by private parties. *Griffin,* 403 U.S. at 105-07; *United States v. Guest,* 383 U.S. 745, 757-60 & n.17 (1966). The facts alleged in plaintiffs' Complaint are sufficient to state a section 1985(3) claim for violation of this right.

Plaintiffs' Complaint alleges that Shaare Tefila Congregation is located in Silver Spring, Maryland and is composed of approximately 500 member families which reside in Maryland and the District of Columbia. Complaint, ¶ 3; Levin Declaration, ¶¶ 4, 5. Members also reside in Virginia. Levin Declaration, ¶ 5. The synagogue building is only 2 miles from the District of Columbia border. Levin Declaration, ¶ 4. Congregants must therefore travel over public roads and across state lines to attend services and other congregation functions.

The Complaint further alleges that defendants conspired and acted to deface the synagogue using words and symbols that vividly evoked the horrors of the Holocaust and the systematic killing of over 6 million Jews, and that in so doing, defendants intended to injure, harass and intimidate the congregants. Complaint, ¶ 11-13. Plaintiffs also allege that congregants suffered emotional distress as well as fear for the safety of the Congregation and of its synagogue. Complaint, ¶ 14. The facts adduced in discovery demonstrate that defendants knew that the words and symbols painted on the synagogue would cause congregants to be upset and fearful. Heine testimony (Tab E) at 76-77; Cobb testimony (Tab D) at 35; Hunt testimony (Tab C) at 97, 103.

These facts would permit a finder of fact to conclude that the purpose and effect of the conspiracy was to deprive District of Columbia and Virginia congregants of their right to travel into Maryland to their house of worship, or to deter Maryland congregants from associating with congregants from the District of Columbia and Vir-

ginia. Under similar circumstances, the Supreme Court in *Griffin* reversed an order dismissing the complaint in that case. The Court held that it was

> open to the petitioners to prove at trial that they had been engaging in interstate travel or intended to do so, that their federal right to travel interstate was one of the rights meant to be discriminatorily impaired by the conspiracy, that the conspirators intended to drive out-of-state civil rights workers from the State, or that they meant to deter the petitioners from associating with such persons.

403 U.S. at 106. Plaintiffs in the instant action are entitled to the same opportunity as was accorded to petitioners in *Griffin* to prove that their constitutional rights were violated.[14]

B. Plaintiffs Have Stated a Section 1985(3) Claim for Violation of Federal Statutory Rights Under 42 U.S.C. §§ 1981 and 1982.

Federal statutory rights, including rights under 42 U.S.C. §§ 1981 and 1982, are appropriate predicate rights under section 1985(3). *E.g., McNutt v. Duke Precision Dental & Orthodontic Laboratories, Inc.*, 698 F.2d 676, 680 (4th Cir. 1983) ("Section 1985(3) . . . provides a remedy for the violation of rights guaranteed by federal law. . . ."); *Witten v. A.H. Smith & Co.*, 567 F. Supp. 1063 (D. Md.

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[14] Defendant's reliance on *Hughes v. Ranger Fuel Corp.*, 467 F.2d 6 (4th Cir. 1972), is misplaced. The infirmity in plaintiffs' claim in that case was their failure to allege any class-based, invidiously discriminatory animus. The court held:

> Nowhere in their complaint do the plaintiffs base their constitutional claim on *a conspiracy generated by a class-motivated animus* to deprive them of . . . the exercise of any constitutional freedom to travel. . . .

467 F.2d at 10 (emphasis added).

1983) (federal statutory rights, specifically including rights under 42 U.S.C. § 1981, may serve as a substantive basis for redress under section 1985(3)). *Accord, Marlowe v. Fisher Body,* 489 F.2d 1057 (6th Cir. 1973).

For the reasons discussed in parts I and II above, no allegation of state action is required to make out a section 1981 claim, and plaintiffs have alleged and set forth evidence in the record that defendants' acts of discrimination were motivated by racial animus, as required by sections 1981 and 1982. Plaintiffs therefore have stated a claim under section 1985(3) for the violation of rights under section 1981 and section 1982.

C. Plaintiffs Have Stated a Section 1985(3) Claim for Violation of Rights Under Maryland Law.

Defendant Remer asserts that the rights protected by section 1985(3) are limited to federal statutory and constitutional rights and that rights owing their existence to state law are not protected under the statute. The legislative history of section 1985(3) and a substantial body of case law are to the contrary.

The Supreme Court has left open the question whether state-created rights can serve as the basis for a section 1985(3) claim. In *United Brotherhood of Carpenters and Joiners, Local 610 v. Scott,* 103 S. Ct. 3352 (1983), the district court had concluded that an alleged assault on non-union workers violated the federally-protected right of association and "encompassed violations of both the civil and criminal laws of the state of Texas, thus depriving plaintiff of the protections afforded by those laws. . . ." 103 S. Ct. at 3356. The Supreme Court, however, expressly declined to consider which rights, including state-created rights, could suffice as predicate rights under section 1985(3):

> because of [its] holding [that section 1985(3) prohibits purely private conspiracies to abridge the First Amendment] the Court of Appeals found it

> unnecessary to determine whether respondents' action could be sustained under § 1985(3) as involving a conspiracy to deprive respondents of rights, privileges, or immunities under state law or those protected against private action by the Federal Constitution or federal statutory law. Conceivably, we could remand for consideration of these possibilities or we ourselves could consider them. We take neither course. . . .

103 S. Ct. at 3358. The Court declined to consider these issues because the non-union workers had failed to show the necessary class-based, invidiously discriminatory animus required by *Griffin*.

The issue also has not been squarely faced by the Fourth Circuit. The violation of state-protected rights was not alleged in the Fourth Circuit cases cited by defendant Remer: *McNutt v. Duke Precision Dental and Orthodontic Laboratories, Inc.*, 698 F.2d 676 (4th Cir. 1983) (affirming dismissal of section 1985(3) claim for violation of rights flowing from Fourteenth Amendment in absence of state action); *Doski v. M. Goldseker Co.*, 539 F.2d 1326 (4th Cir. 1976) (affirming dismissal of sex discrimination claim under Fourteenth Amendment in absence of state action); and *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (4th Cir. 1974) (affirming dismissal of claim by Ku Klux Klan member on ground that right of association is not protected against private interference).[15]

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[15] Many of the other cases cited by defendant also are inapposite because they did not present state right violations. *See, e.g., Holmes v. Finney*, 631 F.2d 150, 154 n.4 (10th Cir. 1980) (finding no violation of federally protected rights in surreptitious taping of conversation, but noting that "[i]n here referring to federally protected rights, we do not feel that all consideration of state law is excluded"); *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) (affirming dismissal of section 1985(3) sex discrimination claim under Fourteenth Amendment in absence of state action);

Both the legislative history of section 1985(3) and numerous decisions construing the statute indicate that state-protected rights are appropriate predicate rights in a section 1985(3) action. The record of the legislative debate is replete with references to the potential of the Act to reach violations of state law rights. Senator Edmunds, who managed the bill on the floor of the Senate, expressed the view that the Act included conspiracies to "overthrow the Government, conspiracies to impede the course of justice, conspiracies to deprive people of the equal protection of the laws, *whatever those laws may be.*" Cong. Globe, 42d Cong., 1st Sess., 568 (April 11, 1871) (emphasis added). *See also id.* at 580 at which Sen. Edmunds explained in the course of a discussion of another section of the same bill that "equal protection of the laws" meant: "What laws? The laws of that State." Senator Morton observed during the debate:

> But it is said these crimes should be punished by the States; that they are already offenses against the laws of the States, and the matter should be left with the States. The answer to that is, that the States do not punish them; the States do not protect the rights of the people; the State courts are powerless to redress these wrongs.

Id. at 252 app. Opponents of the bill repeatedly alluded to the fact that it encompassed conspiracies to commit common law torts and state law crimes. *See, e.g., id.* at 337 (remarks of Rep. Whitthorne) (noting that Act would reach a conspiracy by a father and son to commit "a simple assault and battery"); *id.* at 352-53 (remarks of Rep. Beck) (noting potential of Act to reach "simple assault and battery by two or more persons on others in the same town, village, or neighborhood"); *id.* at 395 (remarks of Rep.

Wright v. Methodist Youth Services, Inc., 511 F. Supp. 307 (N.D. Ill. 1981) (affirming dismissal of section 1985(3) claim under Fourteenth Amendment in absence of state action).

Rainey) (noting that Act would reach violations known to the common law and the laws of every state).

The trend of the Supreme Court's analysis of the legislative history of section 1985(3) supports the view that state-protected rights are appropriate predicate rights in a section 1985(3) action. The Court observed in *Scott* that a narrowing amendment to the original Ku Klux Klan Act was proposed in the House of Representatives to limit the Act from providing a federal remedy for "all tortious, conspiratorial interferences with the rights of others." *Scott,* 103 S. Ct. at 3358, quoting *Griffin,* 403 U.S. at 101. According to the Court, the narrowing amendment "centered entirely on the animus or motivation that would be required." *Scott,* 103 S. Ct. at 3359, quoting *Griffin,* 403 U.S. at 100. As the *Griffin* Court observed:

> The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose - by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.

403 U.S. at 102. Any concern about the breadth of section 1985(3) thus should be allayed by the requirement of an invidiously discriminatory animus and not by cutting back on the categories of predicate rights.

Various federal courts have expressly stated that state statutes are appropriate predicate rights under section 1985(3). The leading authority cited for this conclusion is *McLellan v. Mississippi Power & Light Co.,* 545 F.2d 919 (5th Cir. 1977) (en banc), where the court held that "there can only be a deprivation of the rights of a plaintiff when the action of the defendants is *otherwise* illegal." 545 F.2d at 925 (emphasis in original). Finding that the plaintiff had not attempted "to enlist the aid of any substantive state statutory provision" and that no applicable state law had

been violated, the court concluded that the plaintiff had not stated a section 1985(3) claim. 545 F.2d at 930 (footnote omitted).

The *McLellan* court found support for its independent illegality test in the facts of *Griffin,* in which the object of the conspiracy encompassed violations of both the civil and criminal laws of Mississippi, including assault and battery, false imprisonment, and infliction of mental distress. 545 F.2d at 925 & n.18, 926 & nn. 24-28. *See Griffin,* 403 U.S. at 90-91, 103. Thus, the *McLellan* court found that the violations of state civil and criminal law in *Griffin* satisfied the section 1985(3) requirements of deprivation of equal protection of the laws, an act in furtherance of the conspiracy and injury. 545 F.2d at 926 & n.28. The court noted: "[W]hile it may be true . . . that *Griffin* has in fact federalized state tort law where racial motivation is involved, at least there must be a tort before section 1985(3) may be utilized." 545 F.2d at 927 n.33.

Other federal courts, often relying on *McLellan,* have expressed support for the view that state-protected rights are appropriate predicate rights under section 1985(3). The Ninth Circuit held in *Life Insurance Co. of North America v. Reichardt,* 591 F.2d 499 (9th Cir. 1979) (en banc), that the *Griffin* test required "the deprivation of *any* legally protected right." 591 F.2d at 503 (emphasis added). The court concluded that both the state civil and criminal codes gave the plaintiff a state right or entitlement to be free from the alleged private discrimination. 591 F.2d at 504-05 & nn.12-13. The *Reichardt* court expressly rejected the more narrow construction urged by the defendants which would limit section 1985(3) to deprivations of federal rights, "as opposed to any legal rights or entitlements (including state conferred rights)." 591 F.2d at 505. In so doing, the court relied upon *Harrison v. Brooks,* 446 F.2d 404 (1st Cir. 1971), which held that property owners stated a section 1985(3) action against certain town officials for con-

spiracy to deprive owners of equal protection of the local zoning laws.

Numerous federal cases have adopted the *McLellan-Reichardt* approach. *See, e.g., People v. 11 Cornwell Co.*, 695 F.2d 34, 41-42 (2d Cir. 1982) (holding that failure to sell residence to state for use as facility for mentally retarded adults constituted deprivation of equal protection under section 1985(3) by violating New York Human Rights Law, citing *McLellan* and *Reichardt*); *Earnest v. Lowentritt*, 690 F.2d 1198, 1202 (5th Cir. 1982) (following *McLellan* analysis and noting that white mortgagees' foreclosure of mortgage given by poor black mortgagor could constitute violation of civil laws of Louisiana); *Shimman v. Frank*, 625 F.2d 80 (6th Cir. 1980) (noting that dissident member of union who was assaulted and beaten at union meeting, in violation of Ohio tort law, could collect damages under section 1985(3)). *See also Britt v. Suckle*, 453 F. Supp. 987 (E.D. Tex. 1978) (following *McLellan* analysis and holding that employee's action, claiming that employer discharged and harassed him as a result of his negligence suit against employer in violation of Texas Workman's Compensation Act, established a section 1985(2) claim); *Poirier v. Hodges*, 445 F. Supp. 838 (M.D. Fla. 1978) (following *McLellan* analysis and defining object of conspiracy in terms of independently illegal acts in furtherance of conspiracy).

Since the legislative history of section 1985(3) and the weight of authority support the conclusion that state law rights are appropriate predicate rights under the statute, plaintiffs have stated a section 1985(3) claim based on Maryland criminal and common law.

Conclusion

Because plaintiffs' Complaint states claims under 42 U.S.C. §§ 1981, 1982 and 1985(3), the Motion to Dismiss should be denied.

Respectfully submitted,

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[Exhibits A, G and H Included in Appendix to Petition for Writ of Certiorari as Exhibits E, F and G, respectively; Exhibits B through F Omitted in Printing]

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. R-84-880

SHAARE TEFILA CONGREGATION, *et al.*,
Plaintiffs,

v.

COBB, *et al.*,
Defendants.

[Filed Jan. 29, 1985]

REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

. Michael David Remer, a defendant, by his attorneys, Robert B. Barnhouse and Deborah T. Garren, submits the following reply to the Plaintiffs' Opposition to Motion to Dismiss:

I. The Complaint Does Not State A Claim For Race Discrimination Under 42 U.S.C. §1981.

In his Motion to Dismiss, defendant Remer argues for dismissal of the plaintiffs' claim under §1981 because that statute does not address discrimination on religious grounds. In response, plaintiffs essentially agree that §1981 does not prohibit religious discrimination; however, they argue that they have not alleged such discrimination. Rather, they have alleged that defendants' desecration of the synagogue was motivated by the perception, albeit a false one, that Jews are racially distinct. (*See* Plaintiffs' Opposition at 2.)[1] Plaintiffs contend that the latter alle-

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[1] Throughout this memorandum, the Plaintiffs' Opposition to Motion to Dismiss is referred to simply as Plaintiffs' Opposition.

gation is sufficient to state a §1981 claim for race discrimination. Neither the legislative history of §1981, the specific language of the statute, nor the case law construing the statute justify such a broad extension of its protection.

The legislative history of §1981 definitively shows that the statute was designed to protect blacks from race discrimination. After passage of the Thirteenth Amendment abolishing slavery, the 39th Congress recognized the need for legislation to protect and extend the rights of the newly freed slaves. Accordingly, the Civil Rights Act of 1866 was passed to protect the racial equality of the newly freed blacks.[2] Section 1 of that Act appears in its present-day form as 42 U.S.C. §1981, and the language of §1981 continues to emphasize the racial equality to which that statute, in its varying forms throughout history, always has been addressed:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens. . .* "

(Emphasis added.)

In construing §1981 today, the courts are faced with the difficult task of developing a realistic approach to the modern interpretation of a statute which was passed a century ago. They must struggle to determine the proper application of the statute to modern forms of discrimination unforeseen by the 39th Congress when it passed the Civil Rights Act of 1866. However, they cannot lose

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[2] For a thorough discussion of the legislative history of 42 U.S.C. §1981, *see* Comment, *Developments in the Law - Section 1981*, 15 Harv. C.R.-C.L. L.Rev. 29, 35-69 (1980).

sight of the fact that the statute is limited to race discrimination. *Georgia v. Rachel,* 384 U.S. 780, 791 (1966); *Runyon v. McCrary,* 427 U.S. 160, 167 (1976).

Unfortunately, limitation of §1981 to race discrimination does not delineate clearly the boundaries of the statute's protection because the courts have yet to develop a consistent definition of "race". Certain aspects of §1981's coverage have been established clearly by the courts. For example, §1981 protects the right of black Americans to be free from racial discrimination, whether public or private. *Runyon v. McCrary, supra; Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454 (1979). Likewise, the Supreme Court now has established that white Americans are protected by §1981's prohibition against race discrimination. *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273 (1976).

Other aspects of §1981's coverage are more problematical. Specifically, the courts have encountered difficulties in deciding whether discrimination on account of national origin ever constitutes racial discrimination under §1981. The Supreme Court has indicated that 42 U.S.C. §1982 does not encompass national origin discrimination. *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 413 (1968). Since §§1981 and 1982 properly are construed in a similar fashion (*see* Plaintiffs' Opposition at 26), it is likely that the Supreme Court also would hold that §1981 does not cover national origin discrimination.

Most courts have agreed that national origin discrimination, standing alone, is not covered by the statute. *Martinez v. Hazelton Research Animals, Inc.,* 430 F. Supp. 186 (D. Md. 1977); *Mouriz v. Avondale Shipyards, Inc.,* 428 F. Supp. 1025 (E.D. La. 1977); *Vasquez v. Werner Continental, Inc.,* 429 F. Supp 513 (N.D. Ill. 1977); *Budinsky v. Corning Glass Works,* 425 F. Supp. 786 (W.D. Pa. 1977); *National Assoc. of Government Employees v. Rumsfeld,* 413 F. Supp. 1224 (D.D.C. 1976); *Jones v. United Gas Im-*

provement Corp. 383 F. Supp. 420 (E.D. Pa. 1975); *Gradillas v. Hughes Aircraft Co.*, 407 F. Supp. 865 (D. Ariz. 1975); *Kurylas v. U.S. Department of Agriculture*, 373 F. Supp. 1072 (D.D.C. 1974). *See also* Annot., 43 ALR Fed. 103 (1979); Cook and Sobieski, Jr., *Civil Rights Actions* ¶ 5.08, n.14 (1984). However, confusion arises when both racial discrimination and national origin discrimination arguably are present at the same time. As one district court has noted:

> "The line between discrimination on account of race and discrimination on account of national origin may be so thin as to be indiscernible; indeed, . . . there may in some instances be overlap."

Enriquez v. Honeywell, 431 F. Supp. 901, 904 (N.D. Okla. 1977).

The courts have developed various approaches in an attempt to deal with national origin discrimination claims which are characterized as "racial". Courts typically have rejected the §1981 claims of white plaintiffs of Slavic and Italian descent. *Petrone v. Reading*, 541 F. Supp. 735 (E.D. Pa. 1982) (Italian); *Budinsky v. Corning Glass Works, supra* (Slavic); *Sokolsky v. Corning Glass Works*, 14 FEP Cases 936 (W.D. Pa. 1977) (Slavic); *Hiduchenko v. Minneapolis Medical & Diagnostic Center, Ltd.*, 467 F. Supp. 103 (D. Minn. 1979) (Ukranian). In *Budinsky v. Corning Glass Works, supra*, the court stated:

> ". . .Hispanic persons and Indians, like blacks, have been traditional victims of group discrimination, and. . .are frequently and even commonly subject to a 'racial' identification as 'non-whites'. There is accordingly both a practical need and a logical reason to extend §1981's proscription against exclusively "racial" employment discrimination to these groups of potential discriminatees.

> *The same cannot be said with regard to persons of Slavic or Italian or Jewish origin.* These groups are not so commonly identified as 'races' nor so frequently subject to that 'racial' discrimination which is the specific and exclusive target of §1981. Members of these groups. . .do not properly fall within the coverage of the statute."

(Emphasis added.) *Id.* at 788. Contrary to plaintiffs' contention (*see* Plaintiffs' Opposition at 18), the *Budinsky* decision does not support their argument for §1981 coverage in this case. In *Budinsky*, the court specifically indicated that persons of Jewish origin could not assert a national origin - race discrimination claim.

Most cases which successfully allege a national origin - race discrimination claim under §1981 involve Hispanic Americans, who are asserted to be traditional victims of discrimination and subject to the same types of discrimination as blacks. *See* Annot., 43 ALR Fed. 103 (1979). In evaluating §1981 claims, those cases focus primarily on whether plaintiffs are members of a national origin group which is commonly identified as distinct from the white majority.

For example, in *Martinez v. Hazelton Research Animals, Inc., supra*, this Court dismissed an Hispanic plaintiff's employment discrimination claim under §1981 based on his ethnic and racial background, stating;

> ". . .many people of Hispanic origin cannot be classified as 'non-whites'. Therefore, this court finds that the allegation that the plaintiff is a Hispanic male, without more, is an insufficient allegation of racial background to support an allegation of racial discrimination and thus to state a cause of action under 42 U.S.C. §1981."

Id. at 188. Similarly, in *Lopez v. Sears, Roebuck & Co.*, 493 F. Supp. 801 (D. Md. 1980), this Court denied the defendant's motion to dismiss a §1981 claim, stating:

> ". . .the plaintiff has clearly stated that the alleged discrimination is based both on nationality (Hispanic) *and race (brown).*"

(Emphasis added.) *Id.* at 807. Like many other courts, the *Lopez* court apparently focused on the plaintiff's skin color in finding that he had stated a §1981 claim for race discrimination. *See also Gonzalez v. Stanford Applied Engineering, Inc.*, 597 F.2d 1298 (9th Cir. 1979) (discrimination against persons of Mexican descent, having skin color not characteristically Caucasian, is prohibited by §1981); *Shah v. Mt. Zion Hospital and Medical Center*, 642 F.2d 268 (9th Cir. 1981) (trial judge properly granted summary judgment against East Indian plaintiff's claim because, based on personal observation, plaintiff was Caucasian); *Khawaja v. Wyatt,*, 494 F. Supp. 302 (W.D.N.Y. 1980) (Pakistani-American who contended that defendants' treatment of him was racially based (black) was permitted to allege §1981 claim – the court noted that Hispanic Americans can sue under §1981 upon evidence that there is some racial (*physiological*) component to the discrimination); *Trehan v. IBM Corp.*, 24 FEP Cases 443 (S.D.N.Y. 1980) (white East Indian was not covered by §1981).

Curiously, the plaintiffs rely on the *Lopez* decision discussed above to support their argument that a mere allegation of discrimination motivated by defendants' racial perception is sufficient to withstand a motion to dismiss the §1981 claim. As noted above, that decision does not focus on the defendant's racial perception, but rather on the racial characteristics of the plaintiff's group.

Many of the other cases relied on by plaintiffs also focus primarily on whether the plaintiffs are members of a national origin group which is commonly identified as distinct from the white majority. *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979) (a group which is discriminated against because they are somehow different as compared to "white citizens" is within the scope of §1981);

Garcia v. Gardner's Nurseries, Inc., 585 F. Supp. 369 (D. Conn. 1984) (Hispanics of Puerto Rican descent are a non-white group protected by §1981); *Banker v. Time Chemical, Inc.*, 579 F. Supp. 1183 (M.D. Ill. 1983) (East Indians are frequently identified as non-whites); *Petrone v. City of Reading*, 541 F. Supp. 735 (E.D. Pa. 1982) (plaintiff's §1981 claim was denied because Italians, unlike Hispanics, are not frequently identified as non-white); *Madrigal v. Certainteed Corp.*, 508 F. Supp. 310 (W.D. Mo. 1981) (Hispanics as a group are frequently identified as non-white); *Tayyari v. New Mexico State University*, 495 F. Supp. 1365 (D.N.M. 1980) (Iranians as a group are commonly viewed as racially different from the white majority); *Aprodaca v. General Electric Co.*, 445 F. Supp. 821, 823 (D.N.M. 1978) (Spanish-surnamed plaintiffs have been victims of group discrimination); *Cubas v. Rapid American Corp.*, 420 F. Supp. 663 (E.D. Pa. 1976) (plaintiff contended that Cuban Americans may be considered a non-white racial group within §1981).

It is true that some of the district court cases cited by the plaintiffs contain language which suggests that a defendant's racial perceptions are relevant to §1981 coverage. However, contrary to the plaintiffs' statement (*see* Plaintiffs' Opposition at 17), those cases do not involve claims by national origin groups "which are not ordinarily perceived as racially distinct." Rather, as noted above, those cases emphasize the fact that the various national origin groups involved are commonly identified as racially distinct.

Plaintiffs also rely on an unpublished order entered by Chief Judge Kaufman in *Tolson v. Aitcheson*, Civil Action No. K-78-1120, to support their §1981 claim. (*See* Plaintiffs' Opposition at p. 18.) That Order does not support plaintiffs' novel theory of liability under §1981 for several reasons. The Order was entered on a motion for default judgment and was based on violations of a variety of laws — 42 U.S.C. §§1981, 1982, 1985(3), 42 U.S.C. §3617 and Mary-

land common law. There is no indication that the Court relied on §1981 in allowing the plaintiffs' action against the Jewish plaintiffs. Furthermore, the court in that case clearly did not consider or decide whether §1981 applies to Jews when defendants perceive them as racially distinct. (A copy of Chief Judge Kaufman's Order is attached hereto as Exhibit A.)

To summarize, plaintiffs rely on gratuitous language in a handful of federal district court cases involving national origin discrimination to support their contention that the mere allegation that the defendants were motivated by racial prejudice, in that they perceived Jews as racially distinct, is sufficient to defeat the Motion to Dismiss. No federal appellate court has ever focused on a defendant's subjective racial animus in evaluating the viability of a §1981 claim.[3] Furthermore, most federal district courts which have allowed §1981 suits for national origin — race discrimination have made no reference whatsoever to the individual defendant's subjective racial perceptions. *See Gomez v. Pima County*, 426 F. Supp. 816 (D. Ariz. 1976) (Mexican-American/Spanish-surnamed individuals of brown race or color who alleged that they had been discriminated against because of that race or color stated a §1981 claim); *Enriquez v. Honeywell, Inc.*, 431 F. Supp. 901(N.D. Okla. 1977) (court cannot determine on motion to dismiss whether persons of Spanish descent are caucasian or non-caucasian); *Cubas v. Rapid American Corp., Inc.*, 420 F. Supp. 663 (E.D. Pa. 1976) (discrimination against Cuban-American plaintiff may involve elements of racial discrimination since Cuban Americans may be considered a non-white group); *Puerto Rican Media Action & Educational*

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[3] The only federal appellate decision cited by plaintiffs, *Manzanares v. Safeway Stores, Inc., supra*, contained no discussion of subjective racial perceptions. To the contrary, in allowing a Mexican-American's §1981 suit, it emphasized that Mexican-Americans, as a group, allegedly were treated differently from Anglos, as a group.

Council v. Metromedia, Inc., 10 FEP Cases 1009 (S.D. N.Y. 1975); *Maldonado v. Broadcast Plaza, Inc.*, 10 FEP Cases 839 (D. Conn. 1974); (3) *Miranda v. Amalgamated Clothing Workers*, 10 FEP Cases 557 (D. N.J. 1974).

Reliance on the subjective racial perceptions of defendants in evaluating §1981 claims for national origin - race discrimination has been criticized by the courts and commentators. Thus, in *Khawaja v. Wyatt, supra*, a case relied on by the plaintiffs, the court noted that some courts look to the perceptions of the discriminators:

> "But it has been pointed out that discriminators may be 'poor anthropologists' [citation omitted] and so presumably this approach has its limits as well."

Id. at 305, n.1. *See also* Comment, *Developments in the Law - Section 1981*, 15 Harv. C.R. - C.L. L. Rev. 29, 82-90 (1980).

Even if a few courts arguably have considered the individual discriminators' racial perceptions in deciding §1981 national origin claims, that approach cannot be extended to cover the plaintiffs' §1981 claim herein. Section 1981 has never been extended to cases involving the false racial perception that Jews are members of a distinct race. To the contrary, several courts have indicated that persons of Jewish origin are not members of a group protected by §1981. *Budinsky v. Corning Glass Works, supra* at 788; *Wald v. International Brotherhood of Teamsters*, 24 FEP Cases 616, 619 (C.D. Calif. 1980) (distinguishing Hispanic national origin cases, court noted that the weight of authority supports th view that claims of discrimination against Jews do no. .ll within §1981); *Marlowe v. Fisher Body Division*, 11 FEP Cases 1357 (C.D. Mich. 1975) (Jewish worker had no §1981 claim because Jewishness is not a race.)

Plaintiffs contend that their claim is covered by §1981 because defendants, like the Nazi Party and the Ku Klux

Klan, perceived Jews as racially inferior. They do not contend that society commonly identifies Jews as racially distinct, but that two small, deviant organizations identify Jews as racially distinct. Extension of §1981's protection in the manner proposed by plaintiffs would open a veritable "Pandora's box" of §1981 claims by individuals that were never intended to be covered by the statute. If the plaintiffs' theory is correct, then anyone successfully could allege a §1981 claim merely by stating that an individual defendant, however irrationally, perceived him as racially inferior. Surely, such a result was not intended by the framers of §1981, nor would it be consonant with the courts' holdings in the national origin-race discrimination cases discussed above.

Plaintiffs have attempted to convert defendant Remer's Motion to Dismiss into a Motion for Summary Judgment by introducing affidavits and deposition testimony. (*See* Plaintiffs' Opposition at pp. 5 - 17 and n.7.) To summarize, plaintiffs argue that the individual defendants' racial perceptions are an issue of fact and that the available evidence establishes that: (1) the Nazi Party and the KKK perceive Jews as a separate and inferior race, (2) the slogans and symbols painted on the synagogue represent the anti-Semitic ideologies of the Nazi Party and the KKK, and (3) the dependants understood the meaning of those slogans and symbols and, like the Nazi Party and the KKK, perceived Jews as an inferior race. None of the factual material discussed by the plaintiffs is relevant to the Motion to Dismiss. Even if those facts are correct, the plaintiffs' §1981 claim still must be dismissed for the reasons stated above. Such a claim simply cannot be based on the subjective racial perceptions of individual defendants.[4]

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[4] Of course, in the event that the Court denies the Motion to Dismiss, defendant Remer reserves the right to challenge the facts presented by the plaintiffs by motions filed later in this case.

II. The Complaint Does Not State A Claim Under §1981's "Full and Equal Benefits" Clause Because It Does Not Allege State Action.

In his Motion to Dismiss, defendant Remer argues for dismissal of the plaintiffs' claim under §1981 because they have failed to allege state action. In response, the plaintiffs contend that §1981's "full and equal benefits" clause covers private, as well as state, action. However, they do not cite any conclusive authority in support of their position, and they simply dismiss the authority cited by defendant as "wrong." Under the circumstances, their §1981 claim under the "full and equal benefits" clause must be dismissed.

In arguing for application of the "full and equal benefits" clause to private action, the plaintiffs rely primarily on *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) and its progeny. (*See* Plaintiffs' Opposition at pp. 19-22.) In *Jones*, the Supreme Court held that 42 U.S.C. §1982 bars private racial discrimination in the sale or rental of property. However, §1982 deals only with property rights and does not contain language analogous to the "full and equal benefits" clause of §1981. The other Supreme Court precedent cited by plaintiffs involves application of §1982 or of the contract clause of §1981. Defendant does not dispute application of the latter statutory provisions to private action.

Unlike §1982 and the contract clause of §1981, the "full and equal benefits" clause implies state action. By definition, only the government can interfere with a person's right to the "full and equal benefit of all laws." Private individuals simply are not in a position to interfere with such legal rights. Accordingly, cases arising under the "full and equal benefits" clause typically have involved some sort of governmental action. (*See* defendant's Memorandum in Support of Motion to Dismiss at pp. 6-7.)

Plaintiffs misrepresent when they state that there is considerable authority for application of the "full and equal benefits" clause to private action. (*See* Plaintiffs' Opposition at pp. 22-23.) In that regard, three of the four cases cited by plaintiffs are based on the contract clause of §1981. *Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 518 F. Supp. 993 (D. Tex. 1981) (court recognized that the Third Circuit has found that state action is implicit in "equal benefits" clause; however, it did not decide that issue since the plaintiff was protected under §1981's contract clause); *Hernandez v. Erlenbusch*, 368 F. Supp. 752 (D. Or. 1973) (court relied on §1982 and the contract clause of §1981); *Gannon v. Action*, 303 F. Supp. 1240 (E.D. Mo. 1969), *modified*, 450 F.2d 1227 (8th Cir. 1971) (court found that defendant violated plaintiff's rights under §§1981 and 1982 without discussing the "full and equal benefits" clause.)[5]

Relying on the above weak case authority and denying the correctness of the authority cited by defendants, plaintiffs attempt to stretch the obvious meaning of the "full and equal benefits" language of §1981. They argue that when defendants allegedly broke the law of trespass, they denied plaintiffs the full and equal benefit of that law. Their argument is patently absurd. Presumably, the law of trespass was designed to punish offenders and ensure recompense to their victims. There is no allegation that anyone has refused to enforce that law in the plaintiffs' behalf.

For the reasons stated above and in the Memorandum in Support of Motion to Dismiss, the plaintiffs' §1981 claim

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[5] The remaining case relied on by plaintiffs, *Central Presbyterian Church v. Black Liberation Front*, 303 F. Supp. 894 (E.D. Mo. 1969), involved a preliminary injunction proceeding under §§1981, 1982 and 1985(3). The court found that violations of all three statutes justified issuance of a preliminary injunction, and the case included only minimal discussion of the "full and equal benefits" clause.

under the "full and equal benefits" clause must be dismissed.

III. The Complaint Does Not State A §1982 Claim For Race Discrimination.

Plaintiffs make the same argument with respect to their §1982 claim as they make with respect to their §1981 claim. To reiterate, they argue that their mere allegation, that defendants' desecration of the synagogue was motivated by the false perception that Jews are racially distinct, is sufficient to withstand the Motion to Dismiss. For reasons similar to those discussed in Argument I above, the plaintiffs' argument must fail.

As noted by plaintiffs, §§1981 and 1982 typically are construed in an analogous fashion. (*See* Plaintiffs' Opposition at p. 26.) Both of those statutes were first enacted as part of the Civil Rights Act of 1866 in an effort to protect the racial equality of newly freed blacks. Section 1982, like §1981, guarantees only the same rights as are "enjoyed by white citizens." As such, it is addressed solely to race discrimination. (*See* Memorandum in Support of Motion to Dismiss at p. 10.)

Plaintiffs have not cited a single case to support their contention that a §1982 claim can be based on the subjective racial perceptions of individual defendants. Like their theory for §1981 coverage, if the plaintiffs' theory for §1982 coverage is permitted to prevail, illogical results will accrue. Under that theory anyone successfully could assert a §1982 claim by alleging that an individual defendant, however incorrectly, perceived him as racially inferior to the white majority. Such a result simply was not intended by the framers of §1981, nor is it supported by any case law under §1982. Accordingly, the plaintiffs' §1982 claim must be dismissed.

IV. This Court Lacks Subject Matter Jurisdiction Over This Action Under 42 U.S.C. §1985(3) Because The Complaint Fails To Allege A Deprivation of Rights Guaranteed By Federal Law Or the U.S. Constitution.

As noted previously, §1985(3) provides no substantive rights itself. Rather, it provides a remedy for conspiracies which deprive plaintiffs "of the equal protection of the laws, or of equal privileges and immunities under the laws." Plaintiffs contend that they have alleged a cause of action under §1985(3) based on the following "predicate" rights: (1) the federal constitutional right to interstate travel, (2) 42 U.S.C. §§1981 and 1982, and (3) Maryland criminal and common law. (*See* Plaintiffs' Opposition at pp. 28-40).[6] For the reasons discussed below and in the Memorandum in Support of Motion to Dismiss, plaintiffs have not alleged sufficient facts to show a violation of any of the "predicate" rights covered by §1985(3).

A. Plaintiffs have not stated a §1985(3) claim for violation of the federal constitutional right to interstate travel.

Plaintiffs argue that they have alleged a violation of the federal constitutional right to interstate travel because, based on the allegations in the Complaint, the Court could conclude:

> "that the purpose and effect of the conspiracy was to deprive District of Columbia and Virginia congregants of their right to travel into Maryland to their house of worship, or to deter Maryland congregants from associating with congregants from the District of Columbia and Virginia."

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[6] In Plaintiffs' Opposition, they no longer attempt to assert a violation of the First Amendment right to assemble and worship as a basis for their §1985(3) claim. Apparently, they concede that their Complaint fails to allege the state action which is necessary to prove a conspiracy to infringe First Amendment rights under §1985(3).

Plaintiffs' Opposition at p. 31. Their argument, however creative, simply does not offer a sufficient allegation of a violation of the right to interstate travel.

Significantly, this is the first time that the plaintiffs have revealed the alleged basis for any interference with the right to interstate travel. As noted in the Plaintiffs' Opposition, their Complaint merely alleged that congregant families reside in Maryland, Virginia and Delaware, and that the defendants' alleged desecration of the synagogue was intended to harass and intimidate the congregants. (*See* Plaintiffs' Opposition at p. 30.) Now, the plaintiffs contend that the court properly can infer from the above facts an interference with the right to interstate travel.

None of the cases which have allowed a §1985(3) claim for deprivation of the right to interstate travel involve facts similar to those alleged by the plaintiffs. Contrary to the plaintiffs' argument, *Griffin v. Breckenridge,* 403 U.S. 88 (1971) did not involve similar facts. Specifically, in *Griffin,* the plaintiffs alleged, in pertinent part:

> "4. On July 2, 1966, the . . . plaintiffs . . . were passengers in an automobile belonging to and operated by R. G. Grady of Memphis, Tennessee. They were travelling upon the federal, state and local highways in and about DeKalb, Mississippi . . .
>
> 5. On July 2, 1966, defendants, acting under a mistaken belief that R. G. Grady was a worker for Civil Rights for Negroes, wilfully and maliciously conspired, planned, and agreed to block the passage of said plaintiffs in said automobile upon the public highways, to stop and detain them and to assault, beat and injure them with deadly weapons. . .
>
> 6. Pursuant to their conspiracy, defendants drove their truck into the path of Grady's automobile

> and blocked its passage over the public road. Both defendants then forced Grady and said plaintiffs to get out of Grady's automobile. . ."

Id. at 90. Unlike the *Griffin* plaintiffs, the plaintiffs in this case were not physically stopped by defendants while travelling on the public highways. To the contrary, plaintiffs arguably were not even present when the alleged desecration of the synagogue occurred.

Contrary to the plaintiffs' argument (*see* Plaintiffs' Opposition at pp. 31-32, n.14), *Hughes v. Ranger Fuel Corp.*, 467 F.2d 6, 10 (4th Cir. 1972) supports the defendant's Motion to Dismiss herein. In *Hughes*, the Fourth Circuit held that the complaint failed to state a §1985(3) claim for two reasons: (1) because the plaintiffs had not alleged the requisite class-based animus and (2) *because the plaintiffs had not adequately alleged an interference with their right to travel over the public roads.* The court noted that the fact that the plaintiffs were standing in the public highway when they were assaulted was "purely coincidental" and did not give rise to an interference with the right to travel interstate. Like in the *Hughes* case, it is purely coincidental that the members of the Shaare Tefila Congregation happen to reside in different states.[7]

In asserting an obviously spurious claim for interference with the right to interstate travel, the plaintiffs are trying to avoid the state action requirement applicable to First Amendment claims under §1985(3). Their claim of a violation of the constitutional right to interstate travel is nothing more than a carefully disguised claim for violation of the First Amendment right to assemble and worship. They really are arguing that the defendants' conduct in-

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[7] Significantly, all of the individual named plaintiffs reside in Maryland. Furthermore, the Shaare Tefila Congregation, as an institutional plaintiff, is not entitled to assert an interference with the constitutional right of interstate travel.

terfered with their freedom of religious association. This Court should not allow the plaintiffs to avoid the state action requirement applicable to First Amendment claims under §1985(3) by alleging such a spurious claim for interference with the right to travel. For the reasons discussed above, plaintiffs' §1985(3) claim cannot be based on interference with the constitutional right to travel interstate.

B. Plaintiffs have not stated a §1985(3) claim for violation of 42 U.S.C. §§1981 and 1982.

Plaintiffs argue that their §1985(3) claim properly can be based on violations of 42 U.S.C. §§1981 and 1982. However, for the reasons discussed elsewhere in this memorandum and in the original Memorandum in Support of Motion to Dismiss, plaintiffs have failed to state claims under those sections. Consequently, plaintiffs' §1985(3) claim cannot be based on §§1981 and 1982.

C. Plaintiffs have not stated a §1985(3) claim for violations of Maryland criminal and common law.

Contrary to plaintiffs' statement (*see* Plaintiffs' Opposition at p. 33), neither the case law nor the legislative history of §1985(3) support application of that statute to state-created rights. Although the Supreme Court has not decided whether such rights are protected by §1985(3), it has indicated that the statute's coverage must be construed narrowly. Furthermore, as noted in the Memorandum in Support of Motion to Dismiss at pp. 13-14, numerous courts, including the Fourth Circuit, have emphasized the federal nature of the "predicate" rights protected by §1985(3).

In *Griffin v. Breckenridge*, 403 U.S. 88, 101-02 (1971), the Supreme Court, while extending §1985(3)'s coverage to private conspiracies, emphasized that the statute was not intended "to apply to all tortious, conspiratorial interferences with the rights of others." The Court obviously was determined to avoid federalizing tort law. It was able

to do so merely by requiring proof of discriminatory animus for purposes of §1985(3) claims. However, in the *Griffin* court's discussion of the statute's legislative history, it also indicated that §1985(3) properly is limited to protection of the rights of U.S. citizens:

> "Representative Willard, draftsman of the limiting amendment, said that his version 'provid[ed] that the essence of the crime should consist in the intent to deprive a person of the equal protection of the laws and of equal privileges and immunities under the laws; in other words, that *the Constitution secured, and was only intended to secure, equality of rights and immunities, and that we could only punish by United States laws a denial of that equality*' . . . Representative Shellabarger's explanation of the amendment was very similar: '*The object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens. . .*' "

(Emphasis added.) *Id.* at 100.

In *Great American Federal Savings & Loan Ass'n. v. Novotny*, 442 U.S. 366 (1979), the Supreme Court continued to emphasize that §1985(3) is limited to the protection of federal rights. Holding that §1985(3) is not available to redress violations of rights created by Title VII of the Civil Rights Act of 1964, the Court stated:

> "Section 1985(c) . . . creates no rights. It is a purely remedial statute, providing a civil cause of action when some otherwise defined *federal right*—to equal protection of the laws or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined by the section."

(Emphasis added.) *Id.* at 376. In separate concurrences in *Novotny*, two of the Supreme Court justices stated that

§1985(c) was intended to provide a remedy only for conspiracies "to violate those fundamental rights derived from the Constitution." *Id.* at 379 (Powell, concurring); 383 (Stevens, concurring).

Most recently, in *United Brotherhood of Carpenters and Joiners, Local 610 v. Stotts,* ___ U.S.___, 77 L.Ed.2d 1049 (1983), the Supreme Court, without reaching the question whether state-protected rights are protected by §1985(3), underscored its narrow interpretation of that statute:

> "In the first place, it is a close question whether §1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans. . . . Although we have examined with some care the legislative history that has been marshalled in support of the position that Congress meant to forbid wholly non-racial, but politically motivated conspiracies, we find difficult the question whether §1985(3) provided a remedy for every concerted effort by one political group to nullify the influence of or do other injury to a competing group by use of otherwise unlawful means. To accede to that view would go far toward making the federal courts, by virtue of §1985(3), the monitors of campaign tactics in both state and federal elections, a role that the courts should not be quick to assume. . . .
>
> We realize that there is some legislative history to support the view that §1985(3) has a broader reach. Senator Edmunds's statement on the floor of the Senate is the clearest expression of this view. . .Senator Edmunds's views, since he managed the bill on the floor of the Senate, are not without weight. But we were aware of his views in *Griffin*. . .and still withheld judgment on the question whether §1985(3), as enacted,

> went any farther than its central concern--combatting the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth and Fifteenth Amendments. Lacking other evidence of congressional intention, we follow the same course here."

Id. at 1059-60. Thus, while the decision in *Stotts* turned on the unquestioned necessity for racially-based animus in a §1985(3) claim, it reaffirmed *Griffin's* reluctance to permit the federal statute to become a source of redress for every violation of law.

Although the Fourth Circuit has not considered explicitly a §1985(3) claim based on state-protected rights, the language of its opinions emphasizes that a violation of *federal* rights is required to state a §1985(3) claim. For example, in *McNutt v. Duke Precision Dental & Orthodontic Laboratories, Inc.*, 698 F.2d 676 (4th Cir. 1983), the court stated:

> "The plaintiff's complaint attempted to state a claim under 42 U.S.C.A. §1985(3). It alleges the deprivation of equal protection of the laws arising out of a conspiracy between the two individual defendants to prevent the prosecution of Tankin on the assault charge. Section 1985(3) merely provides a remedy for the violation of rights guaranteed by *federal law or the constitution*. . .Plaintiff's complaint may not be read to state a cause of action under §1985(3) for violation of rights flowing directly and exclusively from the Fourteenth Amendment because neither defendant is a public official. The only specific act allegedly done by Duke, the employer, and Tankin, co-employee, in aid of a conspiracy, was that several months after the plaintiff's discharge the two defendants sought to dissuade the pros-

> ecutor from proceeding with the prosecution of Tankin. That, however, would violate no *federal* right of the plaintiff. Though the plaintiff felt that he had been seriously wronged, he had no *federal* right to exercise the prosecutor's discretion or to foreclose pleas of leniency by the accused and his employer.
>
> There is no allegation that the defendants in any other manner deprived the plaintiff of any privilege or immunity granted by *the laws of the United States.* The district court properly dismissed the §1985(3) claim."

(Emphasis added.) *Id.* at 679-80. The remaining cases cited in the defendant's Memorandum in Support of Motion to Dismiss at pp. 13-16 contain similar language emphasizing the federal nature of the rights protected by §1985(3).

Contrary to plaintiffs' argument (*see* Plaintiffs' Opposition at pp. 37-40), there is little persuasive authority among other circuits for the notion that a state-created right is an appropriate predicate right under §1985(3). The Fifth Circuit's decision in *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977), simply did not address the issue. The only state-created rights asserted by the plaintiff in that case were his private contract rights. The court felt it unnecessary to resolve the issue presented by those state rights because of the absence of the class-based discrimination required by §1985(3).[8] *See also Scott v. Moore*, 640 F.2d 708, 718 (5th Cir. 1981) (suggesting that the question of whether state or federal statutory rights are protected by §1985(3) was not foreclosed by *McLellan*).

---

[8] Indeed, the Fifth Circuit found "it less than clear that one who violates the unique, individual contract rights of another has deprived him of the protection of the laws as *Griffin* construed that phrase." 545 F.2d at 931.

It is true that *Life Insurance Co. of North America v. Reichardt,* 591 F.2d 499 (9th Cir. 1979), held that a state-created right to be free from private discrimination was a right protected by §1985(3). However, the validity of that portion of the *Reichardt* opinion has been questioned in light of subsequent Supreme Court decisions. As the court explained in *Thompson v. International Association of Machinists and Aerospace Workers,* 580 F. Supp. 662 (D.D.C. 1984):

> "Plaintiff states in her opposition to defendants' motion to dismiss that violations of the D.C. Human Rights Act can provide the substantive basis for a §1985(3) claim, relying on . . . *Reichardt* . . . for the proposition that the remedial provisions of §1985(3) apply with equal force to deprivations of state and federal rights. Plaintiff's reliance on *Reichardt* is rejected here as [Great American Federal Savings & Loan Association v.] Novotny, [442 U.S. 366 (1979)] which postdates *Reichardt* by several months, describes §1985(3) as a remedial statute "providing a civil cause of action when some otherwise defined *federal* right--to equal protection of the laws or equal privileges and immunities under the laws--is breached by a conspiracy." *Novotny,* 442 U.S. at 376. . ."

(Emphasis added.) *Id.* at 667. Indeed, at least one district court within the 9th Circuit has found *Reichardt* and *Novotny* irreconcilable. *Kinniburgh v. Burlington Northern Railroad Co.,* 568 F. Supp. 655, 656-57 (D.Mont. 1983).[9]

---

[9] Contrary to the plaintiff's suggestion (*see* Plaintiffs' Opposition at p. 39), *Reichardt* has not been broadly followed by other circuits. While it does appear that the Second Circuit in *People v. 11 Cornwell Co.,* 695 F.2d 34 (2d.Cir. 1982) relied upon the questionable *Reichardt* opinion, neither the 5th Circuit in *Earnest v. Lowentritt,* 690 F.2d 1198 (5th Cir. 1982) nor the 6th Circuit in *Shimman v. Frank,* 625 F.2d 80

Finally, the plaintiff's reliance upon a few selected passages from the voluminous and conflicting legislative history of §1985(3) should not be viewed as supporting the notion that the statute was designed to provide a federal remedy for state-protected rights. As one thoughtful commentary concluded, after a thorough review of the legislative history of the statute:

> "At the heart of the *Griffin* Court's fear of overextending section 1985(c) was the prospect of federalizing tort law--a fear equally applicable to section 1985(c) actions based on contractual or other rights grounded in state law. In this the Court echoed the constitutional and prudential concerns of the 1871 Congress, which sought to preserve the traditional balance of state and federal authority. One might argue, as did the radical Republicans whose efforts were stymied by the moderate majority in 1871, for centralized federal power governing rights based on tort, contract, property, or state statute; the fundamental constitutional decision made by the Founders in 1787 and reaffirmed by the Congresses in the years following the Civil War was otherwise."

Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose,* 46 U.Chi.L.Rev. 402, 429 (1979)[10]

It is clear from the above discussion that the protection of §1985(3) extends only to federal rights. Consequently, plaintiffs' §1985(3) claim cannot be based on alleged violations of Maryland criminal and common law.

(6th Cir. 1980), reached the issue. Indeed, the 6th Circuit's decision in *Shimman* left intact a lower court's dismissal of a §1985(3) claim. 625 F.2d at 86 n.10.

[10] This law review article contains a useful discussion of the legislative history of §1985(3). After reviewing that history, it concludes that the statute should be limited to protecting federal constitutional rights.

Respectfully submitted,

/s/ ROBERT B. BARNHOUSE
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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. K-78-1120

BARBARA TOLSON, *et al.*
v.
WILLIAM M. AITCHESON, *et al.*

ORDER

This matter having come before the Court to be heard on plaintiffs' complaint, motion for default judgment and petition for equitable and declaratory relief, and the Court having considered the pleadings and other papers submitted to the Court, and, being now fully advised, it is hereby ORDERED that:

DEFAULT JUDGMENT

(1) Judgment by default be and hereby is entered against defendant William M. Aitcheson on the issue of his liability to the plaintiffs, as stated in the complaint in this action.

DECLARATORY RELIEF

(1) It is further ORDERED, ADJUDGED AND DECREED that the activities, as set forth in the complaint, of defendant William M. Aitcheson and those in active concert or participation with him violated the Civil Rights laws, 42 U.S.C. §§ 1981, 1982, 1985(3); the Federal Fair Housing law, 42 U.S.C. § 3617, and Maryland common law.

EQUITABLE RELIEF

(1) It is further ORDERED that defendant William M. Aitcheson and all others in active concert or participation with him, who receive notice of this Order, be and they hereby are enjoined from harassing, assaulting, or intimidating plaintiffs or any other black or Jewish persons or organizations in the Washington metropolitan area;[1] trespassing on plaintiffs' property or the property of any other black or Jewish persons or organizations in the Washington metropolitan area or otherwise interfering with plaintiffs, members of the National Association for the Advancement of Colored People, Prince George's County, Maryland Branch, the Metropolitan Washington Planning and Housing Association, B'nai B'rith Hillel Foundation at the University of Maryland, Beth Torah Congregation, and the Jewish Community Council of Washington, or any other black or Jewish persons in the exercise of their rights to reside, own property, conduct business or practice their religion in the Washington metropolitan area. No provision of this Order shall in any way prohibit or restrain any person from the exercise of his constitutional or other lawful rights.

(2) It is further ORDERED that William M. Aitcheson and all others in active concert or participation with him, who receive notice of this Order, be and they are hereby enjoined from burning crosses, carrying or discharging firearms or explosives or placing Ku Klux Klan symbols in the vicinity of homes in the Washington metropolitan area owned or occupied by black or Jewish persons or in the vicinity of places in the Washington metropolitan area where black or Jewish persons congregate for the purpose

---

[1] The Washington metropolitan area as used in this Order comprises the following jurisdictions: Washington, D.C.; Montgomery County and Prince George's County, Maryland; and Alexandria City, Arlington County, Fairfax County, Loudon County and Prince William County, Virginia.

of religious worship or in any place in the Washington metropolitan area where the effect of such activities is likely to be the intimidation of black or Jewish persons for the purpose of interfering with the exercise of their rights to reside, own property, conduct business, or practice their religion in the above-mentioned area.

(3) It is further ORDERED that defendant William M. Aitcheson shall not engage in or cause others to engage in any future physical, audio, or visual contact with the Barbara Tolson - Philip D. Butler family in any manner or form.

(4) It is further ORDERED that defendant William M. Aitcheson will inform the Court,through his counsel, of his present address and any change in his address during the next five years (commencing from the date of this Order). All such information provided by the said defendant to this Court in accordance with this Paragraph (4) will, upon the receipt thereof, be placed in the official court file in this case, under seal, and will not be revealed to anyone without an advance showing of good cause therefor and without written notice to counsel for the defendant and without an Order of this Court.

(5) It is further ORDERED that counsel for the defendant serve a true copy of this Order upon William M. Aitcheson on or before May 3, 1982, and notify this Court, in writing, on or before that date that he has so done.

(6) Anyone in active concert or participation with defendant William M. Aitcheson during the period encompassed by the complaint having notice of this Order who violates any of the terms thereof shall be subject to arrest, prosecution and punishment by imprisonment or fine, or both, for criminal contempt under the laws of the United States of America. Alternatively, such person may be ordered to show cause why he should not be held in contempt, and subjected to remedial orders of this Court which

may include, among other provisions, imprisonment or fine, or both.

It is so ORDERED, this 21st day of April, 1982.

/s/ FRANK A. KAUFMAN
Chief United States District Judge

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1986

No. 85-2156

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

v.

JOHN WILLIAM COBB, *et al.*,
Respondents.

ORDER

The motion of Anti-Defamation League of B'nai B'rith, et al. for leave to file a brief as *amici curiae* is granted. The motion of respondent Michael David Remer for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted. The case is set for oral argument in tandem with No. 85-2169, *St. Francis College* v. *Al-Khazraji*. Justice Scalia took no part in the consideration or decision of these motions and this petition.

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2156

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

v.

JOHN WILLIAM COBB, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Did the court below err in holding that a Jewish plaintiff in an action under 42 U.S.C. § 1982 must prove that he or she is a member of a "non-white race," with the result that Jews can never state a claim under 42 U.S.C. § 1982 even where, as here, they are victims of conduct motivated by a Ku Klux Klan and Nazi-inspired racial animus against Jews?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court of appeals were appellants (now petitioners) Shaare Tefila Congregation, Rabbi Martin S. Halpern, Shirley Altman, William Harkaway, Marshall S. Levin, Maurice Potosky and Dr. Jacob Teller. Petitioners will be referred to collectively herein as "the Congregation." Appellees below (now respondents) were John William Cobb, William Randall Harris, Thomas Lloyd Heine, William Hess, Thomas Joseph Hunt, Jr., Raymond Lee Jordan, Dominic Queen and Michael David Remer. The Rule 28.1 statement regarding Shaare Tefila Congregation was made in its Application for Extension of Time to File Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit, filed May 14, 1986, at note 1.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2156

Shaare Tefila Congregation, *et al.*,
Petitioners,

v.

John William Cobb, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-23a) is reported at 785 F.2d 523.[1] The opinion of the United States District Court for Maryland (Pet. App. 24a-35a) is reported at 606 F. Supp. 1504.

JURISDICTION

The Fourth Circuit rendered and entered its judgment (Pet. App. 36a) on March 7, 1986. Chief Justice

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[1] "Pet. App." refers to the Appendix to the Petition for Certiorari.

Warren E. Burger extended the time to file a petition for certiorari to and including July 5, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

42 U.S.C. § 1982 (1982)

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

Civil Rights Act of 1866
Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, * * * are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, * * * shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

STATEMENT OF THE CASE

On November 1, 1982, respondents desecrated the synagogue of Shaare Tefila Congregation with spray-painted anti-Semitic slogans and symbols, including swastikas, a burning cross, the words "DEAD JEW," "DEATH TO THE JUDE," and "IN, TAKE A SHOWER JEW" (Pet. App. 43a, 49a-56a).[2] Shaare Tefila Congregation is a Jewish community of approximately 500 member families which assembles at its synagogue for worship and other community activities (Pet. App. 41a). Before desecrating the synagogue, respondents spray-painted the outside walls of a nearby Drug Fair with a burning cross, the slogans "White Power" and "Arian [*sic*] Brotherhood," the initials KKK, an eagle with a swastika, a Star of David with an arrow through it, and their initials (Pet. App. 43a). While they vandalized the Drug Fair, one of the respondents suggested: "Somebody should do that to a synagogue." In response to that suggestion, respondents then walked as a group across the parking lot and defaced the walls of Shaare Tefila synagogue (Pet. App. 12a, 43a). They also painted a swastika on a car owned by a member of the Congregation (Pet. App. 49a).

Petitioners filed a civil rights action against respondents in the United States District Court for Maryland, seeking redress under 42 U.S.C. §§ 1981, 1982, and 1985(3) (Pet. App. 39a-48a).[3] The complaint

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[2] Photographs showing the defacement of the synagogue walls are reproduced at Pet. App. 51a-56a.

[3] The Congregation also brought pendent state claims for trespass, nuisance, and intentional infliction of emotional distress (Pet. App. 46a).

alleged that respondents' conduct "was motivated by racial prejudice in that defendants perceive plaintiffs as racially distinct because they are Jews," in violation of 42 U.S.C. § 1982 (Pet. App. 45a).

Although the parties have not completed discovery,[4] the record below confirms that respondents' desecration of the synagogue was an expression of racial animus toward Jews. Respondents admit that they chose the words and symbols they painted on the synagogue because of their association with Nazi and Ku Klux Klan ideology, which espouses the false and abhorrent doctrine that Jews are a distinct and inferior race. Respondents' paintings of swastikas, an eagle over a swastika,[5] and the words "DEATH TO THE JUDE," "IN, TAKE A SHOWER JEW," "TO-TEN KAMF RABAND," and "DEAD JEW" on the synagogue walls invoked the tragic legacy of Nazi Germany and the systematic killing of over six million Jews in the Holocaust. The swastika was the symbol of the Nazi Party from its inception, and the phrases

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[4] Petitioners have taken the deposition testimony of respondents Hunt, Heine, Queen, and Cobb. While the motion to dismiss was pending, petitioners sought leave to depose respondent Remer in prison pursuant to Fed. R. Civ. P. 30(a). That motion was pending when the district court dismissed the complaint (J.A. 3).

[5] Respondents have identified the swastika as a Nazi symbol and all four respondents who have been deposed have identified the eagle painted on the Drug Fair as a Nazi eagle. *See* Deposition of Dominic Queen (April 18, 1984) at 21; Deposition of John W. Cobb (Sept. 6, 1984) at 27, 54; Deposition of Thomas Lloyd Heine (Oct. 19, 1984) at 50-51; Deposition of Thomas Joseph Hunt, Jr. (Nov. 1, 1984) at 61. Respondent Hunt testified that respondent Remer has an eagle like the eagle painted at the Drug Fair tattooed on his leg. Hunt deposition at 60.

"DEAD JEW," "DEATH TO THE JUDE" [6] and "IN, TAKE A SHOWER JEW" refer to the Third Reich's "final solution to the Jewish problem"—the Holocaust (Pet. App. 61a-63a).[7] The phrase "TOTEN KAMF RA-BAND" next to the skull and crossbones painted on the synagogue is a garbled reference to the Totenkopfverbände, the "death head units" of Nazi concentration camp guards from 1936 through World War II (Pet. App. 63a). The skull and crossbones was the insignia of the Totenkopfverbände (Pet. App. 63a). The burning crosses which respondents emblazoned on the synagogue walls are the symbol of the Ku Klux Klan (Pet. App. 58a).[8]

Respondent Remer conceded in his opposition to the petition for certiorari "the respondents' admittedly

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[6] Jude is German for Jew.

[7] Respondents conceded their understanding that the slogans "DEAD JEW" and "IN, TAKE A SHOWER JEW" referred specifically to the Nazi extermination of Jews during World War II. *See* Hunt deposition at 93-94; Cobb deposition at 58-59; Heine deposition at 76. Various respondents also testified on deposition that there was discussion about the Nazis during the defacement of the Drug Fair and the synagogue. For example, respondent Heine testified that respondent Remer talked about the Nazis during the course of the desecration on November 1. Heine deposition at 40. *See also id.* at 78. Respondent Cobb agreed that the Nazis were discussed during the desecration. Cobb deposition at 55. *See also id.* at 27.

[8] One of the Klan's traditional methods of harassing blacks, Jews, or other groups it believes are inferior has been to burn a cross on their property (Pet. App. 58a). Respondents admitted their understanding that the burning cross is associated with the Ku Klux Klan. *See* Hunt deposition at 73; Cobb deposition at 34; Heine deposition at 47. In fact, respondent Hunt has a burning cross tattooed on his arm. Hunt deposition at 71.

irrational misapprehensions of Jews as members of a distinct and inferior race."[9] Moreover, the undisputed affidavits of Robert Wolfe and David M. Chalmers, which the Congregation submitted in opposition to the motion to dismiss (Pet. App. 57a-75a), show that Nazi and KKK bias against Jews is based on racial prejudice. Mr. Wolfe, the Chief of the Modern Military Headquarters Branch of the National Archives, is the custodian of captured documents of the Third Reich (Pet. App. 61a). Mr. Wolfe attested that "[i]t was one of the central tenets of Nazi ideology that Jews were defined as racially distinct from Aryan, or white, German citizens" (Pet. App. 63a).[10] The Nuremberg Laws of September 15, 1935 and November 14, 1935 raised this notion to a legal command: Jews were declared a separate race and denied the rights of German cit-

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[9] Brief of Michael David Remer in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, at 2 (Sept. 8, 1986) (footnote omitted).

[10] Hitler's misconceived belief that Jews are racially distinct formed the basis for his virulent anti-Semitism and program to exterminate the Jews:

> The Jew has always been a people with definite racial characteristics and never a religion* * * .
>
> * * *
>
> The Jewish state was never spatially limited in itself, but universally unlimited as to space, though restricted in the sense of embracing but one race* * * . It is one of the most ingenious tricks that was ever devised, to make this state sail under the flag of "religion," thus assuring it of the tolerance which the Aryan is always ready to accord a religious creed. For actually the Mosaic religion is nothing other than a doctrine for the preservation of the Jewish race. [A. Hitler, *Mein Kampf* 306, 150 (R. Manheim trans. 1943).]

izens (Pet. App. 63a, 66a-75a).[11] Dr. Chalmers, one of the foremost authorities on the Ku Klux Klan and author of *Hooded Americanism: The History of the Ku Klux Klan* (2d ed. 1981), attested that "a prevalent belief among the various Ku Klux Klan groups is that Jewish people are racially distinct from whites" (Pet. App. 58a).[12]

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[11] That Nazism and other forms of anti-Semitism are motivated by racial prejudice has been judicially recognized. *See Banker* v. *Time Chemical, Inc.*, 579 F. Supp. 1183, 1186 (N.D. Ill. 1983) ("[t]he vicious anti-Semitism directed against the Jews of Nazi Germany, for example, was racially motivated"); *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 567 (E.D. Cal. 1982) ("[t]he history of 'racial prejudice' against Jews throughout Europe and in this country appears to be so well known as almost not to require documentation").

[12] This conclusion is supported by other studies:

> The fundamental theme of Klan ideology is the racist doctrine of "white supremacy," a concept that has motivated the hooded orders since their inception. It serves as justification for bigotry and violence against blacks, Jews, Hispanics, Orientals and other minorities. [Anti-Defamation League of B'nai B'rith, *Hate Groups in America: A Record of Bigotry and Violence* 17 (1982).]

In The Thunderbolt, the official publication of the National States Rights Party, which is ideologically linked to the Klan, J.B. Stoner, the party's national chairman, distinguished Jews from Whites:

> The negro [*sic*] is a violent enemy and he is a biological enemy because negro [*sic*] blood destroys White blood when the two are mixed together. However, the negro [*sic*] is not the enemy. The Jew is THE enemy of our White Race and the Jew is using the negro [*sic*] in an effort to destroy the White Race that he so passionately hates. [J. Stoner, *The Philosophy of White Racism*, The Thunderbolt (Oct. 1973).]

Each of the respondents has testified that the Nazi and Klan ideologies, whose slogans and symbols they painted on the synagogue, extol racism against Jews to promote a "superior" race—a white race that excludes Jews. For example, respondent Heine referred to Jews as a racial group in his description of KKK activity:

> Q. What is obviously known about [the Ku Klux Klan]?
>
> A. They're prejudiced. They're just against black people and Jewish people and I guess some other races or something.[13]

When asked whether respondent Remer spoke about the Jewish people while he vandalized the Drug Fair, respondent Cobb testified that he spoke about the "white race."[14]

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[13] Heine deposition at 47. Respondent Heine also testified that the Nazis sought to develop a "superior race" that would exclude blacks and Jews. Heine deposition at 52-53. Respondent Queen understood that the slogan "Aryan Brotherhood" (painted by respondents on the Drug Fair as "Arian [*sic*] Brotherhood") reflected a Nazi ideology that excludes Jews from the "Aryan people." Queen deposition at 21-22.

[14] Cobb deposition at 29, 32. Respondent Cobb also defined anti-Semitism in terms of racism:

> Q. Mr. Cobb, are you familiar with the term anti-Semitic?
>
> A. Something like racism or something.
>
> * * *
>
> Q. Racism against whom?
>
> A. Against different races, I guess, different people.
>
> * * *

When asked why he thought a Jew seeing the phrase "Dead Jew" painted on a synagogue would feel uncomfortable, respondent Hunt replied: "It's an insult to your race."[15]

Before the parties completed discovery, respondent Remer filed a motion based on Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint in its entirety. Without hearing oral argument or considering the extensive deposition testimony, affidavits, or other material submitted in opposition to the motion, the district court granted Remer's motion to dismiss all counts of the complaint.[16] Apparently believing that the question of whether the defendants acted out of racial prejudice turns on whether the plaintiffs are members of a

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Q. You said it's a term that signifies racism of some sort. I'm asking you racism against whom?

A. I guess against Jewish people or the blacks or whoever. [Cobb deposition at 31.]

[15] Hunt deposition at 94.

[16] Deposition excerpts and the affidavits cited herein were among the materials submitted by petitioners with their opposition to respondents' motion to dismiss in the district court. The district court refused to consider the extra-pleading materials, purportedly because they "are inappropriate in a motion based, as this one is in part, on Rule 12(b)(1)* * *" (Pet. App. 24a n.1). This conclusion is, however, contrary to *Saval* v. *BL Ltd.*, 710 F.2d 1027, 1029 n.2 (4th Cir. 1983) ("[a]s to motions to dismiss under Rule 12(b)(1), courts may consider affidavits and other extrinsic information to determine whether subject matter jurisdiction exists"). In any event, when the district court chose to exclude the material outside the pleadings, it was bound to deny the motion unless it appeared beyond doubt that petitioners could prove no set of facts which would entitle them to relief. *See Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

"non-white" race, the district court concluded that Jews could never state a claim under §§ 1981 and 1982 (Pet. App. 30a). The district court believed that permitting such a claim would allow coverage of those sections to be based "entirely on the idiosyncrasies of individual defendants" (Pet. App. 30a).

A panel of the United States Court of Appeals for the Fourth Circuit affirmed, but filed three separate opinions (Pet. App. 1a-23a). Judge Hall, writing for the court, concluded that the court could "find nothing in the statute, its legislative history, or subsequent case law which would lead [it] to conclude that section 1982 was intended to apply to situations in which a plaintiff is not a member of a racially distinct group but is merely *perceived* to be so by defendants" (Pet. App. 6a) (emphasis in original). Judge Hall wrote that the court did not "find the position of Jews in this society to be analogous to that of Mexican-Americans or others commonly considered to be non-whites," and so to allow the Congregation to state a claim under § 1982 "would permit charges of racial discrimination to arise out of nothing more than the subjective, irrational perceptions of defendants. Such perceptions are not what section 1982 was intended to protect against" (Pet. App. 7a). Judge Murnaghan, who concurred with Judge Hall, agreed that respondents' "misperceptions of fact" should not confer federal jurisdiction, and concluded that "such ill mannered and unreasoned fracases" should not be accorded "the dignity of status as civil rights controversies" (Pet. App. 10a). Judge Murnaghan concluded that such disputes belong in state courts.

Judge Wilkinson dissented. He reasoned that respondents' conduct here was no more mistaken than

any other act of racism, because all such acts are fundamentally wrongheaded and in error:

> All racial prejudice is the result of subjective, irrational perceptions, which drain individuals of their dignity because of their perceived equivalence as members of a racial group. The Civil Rights Acts of 1866 and 1871 were enacted precisely to halt the spread of violence and hatred by those motivated by such perceptions, and plaintiffs in this case, no less than those in the usual racial discrimination case, have suffered the consequences of abhorrent notions concerning racial identity and its relevance. Rather than allowing ignorance and misperception to provide their own defense, I would find the erroneous but all too sincere view of defendants that Jews constitute a separate race worthy of humiliation and degradation sufficient to bring the claim within 42 U.S.C. §§ 1982 and 1985(3). [Pet. App. 11a (footnote omitted).][17]

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[17] Judge Wilkinson concluded that petitioners' claim under § 1985(3), the civil rights conspiracy statute that originated in the Ku Klux Klan Act of 1871, should be reinstated to the extent it alleges a violation of § 1982 (Pet. App. 11a n.1). This conclusion is correct because federal statutory violations constitute deprivations of "equal protection of the laws or equal privileges and immunities under the laws" which give rise to liability under § 1985(3). *See Great Am. Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 376 (1979). *Accord, e.g., McNutt* v. *Duke Precision Dental & Orthodontic Laboratories, Inc.*, 698 F.2d 676, 679-80 (4th Cir. 1983) ("[s]ection 1985(3) merely provides a remedy for the violation of rights guaranteed by federal law or the Constitution"); *Holmes* v. *Finney*, 631 F.2d 150, 154 (10th Cir. 1980) ("infringement of some federally protected right independent of

Judge Wilkinson rejected the impression left by the majority opinion "that the incident at issue here was an isolated event with only speculative racial overtones" (Pet. App. 11a). He reviewed the record and the standards governing consideration of a motion to dismiss and concluded that "there is no question on appeal that defendants considered Jews to be a racially distinct group" (Pet. App. 13a). The racist conduct of respondents in desecrating the synagogue is enough to give rise to a § 1982 claim, Judge Wilkinson determined, because it is "preposterous to require that these [racist] beliefs be objectively true before federal law provides protection. To the contrary, it is precisely because such beliefs are false and reprehensible that federal civil rights laws were enacted. These laws provide redress for the harms suffered by misperceptions about the relevance of race as a basis for action in our society" (Pet. App. 15a).

Judge Wilkinson further rejected the majority's approach because it would "require[] courts to determine by some more objective criteria whether an individual is a member of a distinct race before the Civil Rights Act of 1866 may apply" (Pet. App. 18a). Judge Wilkinson believed it "regrettable that the majority has adopted an approach that demands judicial draftsmanship of an officially recognized and protected list of races. It is doubly regrettable that it

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§ 1985(3) is required for a violation of the conspiracy statute to be demonstrated"); *Cohen* v. *Illinois Inst. of Technology*, 524 F.2d 818, 828 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) ("[t]here is * * * a requirement that the conspiracy deprive the plaintiff of a federally protected right"); *Witten* v. *A.H. Smith & Co.*, 567 F. Supp. 1063, 1071-72 (D. Md. 1983) (federal statutory rights, specifically including rights under § 1981, may serve as a substantive basis for redress under § 1985(3)).

adopts this approach in a case where the racial nature of the acts is so compelling" (Pet. App. 21a-22a) (footnote omitted). Judge Wilkinson "would hold the congregation of Shaare Tefila Synagogue entitled to the protection of our civil rights laws [because] [t]o do otherwise is to blind ourselves as a nation to the real nature of race prejudice, and to leave American citizens open to the depredations of racial violence—the very acts against which Congress more than a century ago had sought to protect them" (Pet. App. 23a).

SUMMARY OF ARGUMENT

This Court's holdings construing § 1 of the Civil Rights Act of 1866 make clear that the Act protects against "*all racially motivated deprivations* of the rights enumerated in the statute * * *." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968) (emphasis added). Yet the United States Court of Appeals for the Fourth Circuit held that Jews can never state a claim under 42 U.S.C. § 1982, a successor to the 1866 Act, because they are not a "racially distinct group."

Jews, of course, are not racially distinct from whites. But this Court consistently has concluded that racism is the evil that the 1866 Act was intended to combat, regardless of the identity of the group against which that racism is directed. In fact, whites may state a claim under 42 U.S.C. §§ 1981 and 1982, the successors to the 1866 Act. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). Whites may state a claim even where the discrimination against them is perpetrated by other whites, *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), as long as the discrimination is racial in character. This

Court should reject any effort to carve an exception in the coverage of the statute for Jews and other groups that are not racially distinct from whites but are the victims of racial violence and discrimination.

The Fourth Circuit's effort to define certain groups out of the protection of § 1982 inevitably would embroil the federal courts in the question of what a race is, and what groups in our society are racially distinct. This is an inappropriate task for the federal courts, and one which is made virtually impossible by the lack of a generally accepted scientific definition of race. Moreover, even if some scientific definition of race were available, it is the perceptions of racial distinctness held by the perpetrators of racial discrimination and violence that the statute is intended to address. The Fourth Circuit's conclusion is sadly ironic, because it absolves the respondents from liability precisely because their racist notions about Jews are so incorrect.

The Fourth Circuit's holding that Jews can never state a claim under § 1982 denies the protection of that statute to a group that is all too often the victim of the utterly erroneous belief that Jews are a separate race. Protection of Jews under § 1982 is an important weapon against the admitted racism against Jews of these respondents, and others like them, who perpetrate anti-Semitic discrimination and terror.

ARGUMENT

THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT § 1982 DID NOT APPLY TO A RACIALLY-MOTIVATED ATTACK ON PETITIONERS BECAUSE THE COURT ASSUMED THAT THE SCOPE OF STATUTORY COVERAGE WAS DETERMINED BY THE PETITIONERS' "RACE" RATHER THAN, AS REQUIRED BY THIS COURT, THE RACIAL MOTIVATION AND CHARACTER OF THE RESPONDENTS' CONDUCT.

A. Under This Court's Holdings Construing § 1 of the Civil Rights Act of 1866, Petitioners State a Claim Because the Discrimination Perpetrated by Respondents Was Racial in Character.

Nothing in this case could be plainer than that the petitioners were the victims of a racially-motivated attack. The whole point of respondents' conduct was to drive home to petitioners, in a particularly abusive and painful way, the continued menace of the completely erroneous Nazi and KKK ideology that Jews are a distinct and inferior race who do not deserve the same rights as other citizens.

The court of appeals nonetheless denied petitioners the benefit of a statute designed to redress injury caused by "*all racially-motivated deprivations* of the rights enumerated in the statute * * * ." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968) (emphasis added). The court of appeals sought to justify what, on its face, seems a patently unjust result with the seemingly benign and comforting conclusion that Jews are not, in fact, "a racially distinct group" or, at least, are not a group like "Mexican-Americans or others commonly considered to be non-whites" (Pet. App. 7a).

The surface benignity fades all too quickly. The Fourth Circuit's unsupported "finding" that Mexican-Americans are, or are commonly thought to be, "non-white," and its facile assumption that the vicious ideology that erupted against petitioners in this case is not "common," are two good examples of why courts should stay out of the business of determining the race, or the commonly assumed racial classification, of the plaintiff in a § 1982 case. Instead, courts should focus, as the decisions of this Court require, on the racial character and motivation of the defendants' conduct.

Section 1982 originated as part of § 1 of the Civil Rights Act of 1866, which was titled: "To protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication." The 1866 Act was prompted by Congressional concern about the "Black Codes," oppressive conditions of employment imposed on former slaves by their former masters, and other restrictions on the civil rights of blacks.[18] Yet the statute was cast in sweeping language which, by its terms, extended beyond coverage of blacks to protection of "all persons."[19] This Court

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[18] *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (remarks of Sen. Trumbull, author of the 1866 Act).

[19] Section 1 of the 1866 Act provided: "That all persons born in the United States and not subject to any foreign power * * * shall have the same right * * * to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens * * *." *See McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 289 (1976); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 422-37 (1968).

has recognized that the 1866 Act leaves no room for "ingenious analytical instruments" that would carve exceptions in its coverage, and has declared: "We think that history leaves no doubt that, if we are to give [the law] the scope that its origins dictate, we must accord it a sweep as broad as its language." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968), *quoting United States* v. *Price*, 383 U.S. 787, 801 (1966).[20]

This Court has never required plaintiffs in a case brought under the successors to the 1866 Act to prove that they are, in fact, of any particular racial lineage. To the contrary, in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), this Court rejected the argument that § 1982 does not protect a white plaintiff who suffered expulsion from a community park organization because of his attempt to transfer his membership share in the community park to a black. The Court looked not to Sullivan's race, but the reason for the discrimination against him.[21] The discrimination against Sullivan was racist in that he was expelled for advocating inclusion of a black in the organization. Thus, the Court held that Sullivan stated a claim under § 1982, even though the discrimination was not based on his own race, which was white.[22] The Court reached the same conclusion in *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973), in which it held that summary judgment was improperly granted in favor of the

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[20] *Accord City of Memphis* v. *Greene*, 451 U.S. 100, 120 (1981); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969).

[21] 396 U.S. at 237.

[22] *Id.*

defendant on a § 1982 claim by whites that their black guests were excluded from a recreation facility on account of race.[23]

The Court again rejected an artificial restriction that would limit coverage of th[e] 1866 Civil Rights Act to less than all racist deprivations of the enumerated rights when it held in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), that the statute prohibits racial discrimination against whites as well as nonwhites.[24] The Court grounded its holding in *McDonald* in the "language and history" of the statute.[25] The Court observed that the statute explicitly applies to " '*all* persons' (emphasis added), including white persons,"[26] and rejected the argument

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[23] *Accord Parr* v. *Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 890 (11th Cir. 1986) (white may state a claim under § 1981 for racial discrimination based on interracial marriage); *Pomeroy* v. *Merritt Plaza Nursing Home, Inc.*, 760 F.2d 654, 657 (5th Cir. 1985) ("addressing the question of jurisdiction under § 1982, both the Supreme Court and this Court have held that white persons who are injured because of antiblack prejudice may obtain relief in federal court").

[24] The issue in *McDonald* arose in the context of a claim under 42 U.S.C. § 1981, which provides that "[a]ll persons * * * shall have the same right * * * to make and enforce contracts * * * as is enjoyed by white citizens * * *." Sections 1981 and 1982 both originated in § 1 of the Civil Rights Act of 1866. Thus, "[i]n light of the historical interrelationship between § 1981 and § 1982 [there is] no reason to construe these sections differently * * * " and cases under § 1981 are useful precedents in construing § 1982. *Runyon* v. *McCrary*, 427 U.S. 160, 171 (1976), *quoting Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973).

[25] 427 U.S. at 286-87.

[26] *Id.* at 287.

that the phrase "as is enjoyed by white citizens" limits the coverage of the statute to non-whites. That language "was offered explicitly to technically 'perfect' the bill, and was accepted as such without objection or debate."[27] The Court explained that this phrase simply emphasizes " 'the racial character of the rights being protected.' "[28]

The legislative history cited by the Court in *McDonald* reflected that "the bill was routinely viewed, by its opponents and supporters alike, as applying to the civil rights of whites as well as non-whites."[29] Members of Congress fully recognized and intended that the coverage of the Act would extend to all persons, not just to selected "races" or categories of persons, the benefits of protection of their

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[27] *Id.* at 290-91. The legislative history suggests that the addition of this phrase was prompted by concerns that the Act might be construed to extend rights, such as the right to enter into binding contracts, to women or minors. Cong. Globe, 39th Cong., 1st Sess. 1293 (1866) (remarks of Rep. Shellabarger); *id.* at App. 157 (remarks of Rep. Wilson), *quoted in McDonald*, 427 U.S. at 293.

[28] *Id.*, *quoting Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966). *Accord City of Memphis* v. *Greene*, 451 U.S. 100, 131 (1981) (White, J., concurring) ("[p]urposeful racial discrimination is quite clearly the focus of the proscription, and this understanding of § 1982 is supported by the legislative history of the Civil Rights Act of 1866"); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975) ("§ 1981 affords a federal remedy against discrimination in private employment on the basis of race"); *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966) (what Congress intended to protect was not particular groups, but "a limited category of rights. specifically defined in terms of racial equality").

[29] *McDonald*, 427 U.S. at 289.

civil rights, including the right to hold property.[30] The legislative history further demonstrates that Congress did not conceive of the bill as a protection for any specified group of "races."[31] In opposing the bill, Sen-

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[30] Sen. Johnson described the scope of § 1 of the Act as follows:

> [N]o State shall discriminate at all between any inhabitants within her limits on account of any race to which they may belong, whether white or black * * *. [Cong. Globe, 39th Cong., 1st Sess. 505 (1866).]

Senator Trumbull stated that proposition emphatically: "Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights * * *." *Id.* at 599. House sponsors of the bill agreed: "[W]e must do as best we can to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men." *Id.* at 1118 (remarks of Rep. Wilson). *Accord* Cong. Globe 41st Cong., 2d Sess. 3569 (1870) (remarks of Sen. Trumbull on the Enforcement Act of 1870, which reenacted the 1866 Act); *id.* at 3608 (remarks of Sen. Schurz).

[31] In fact, the legislative history indicates that members of Congress had very broad views of what groups constitute "races." Members identified as racial groups persons who generally are considered today to be national origin or religious groups. *E.g.*, "I controvert that a single citizen was ever made by one of the States out of the Chinese race, out of the Hindoos, or out of any other race of people but the Caucasian race of Europe." Cong. Globe, 39th Cong., 1st Sess. 523 (1866) (remarks of Sen. Davis); "All the nations of the earth and all the varieties of the races of the nations of the earth have gathered here. In the early settlements of the country, the Irish, the French, the Swede, the Turks, the Italian, the Moor, and so I might enumerate all the races and all the variety of races, came here * * *," *id.* at 570 (remarks of Sen. Morrill); "Who will say that Ohio can pass a law enacting that no man of the German race * * * shall ever own any property in Ohio * * *?" *id.* at 1294

ator Cowan challenged Senator Trumbull, the Chairman of the Senate Judiciary Committee and author of the bill, on the meaning of the word "race":

> I should like the honorable Senator from Illinois or any other senator to tell me what is meant by the word "race," and where it is settled that there are two races of men, and if it is settled that there are two or more, how many. Where is the line to be drawn? What constitute the distinctive characteristics and marks which limit and bound these races?[32]

Senator Trumbull, the author of the Act, did not define "race" in response, and no such definition appears in the legislative history. The sponsors of the Act were steadfast in their insistence that the statute's application was not limited to particular "races" but that it applied to "prohibit *all* racially motivated deprivations of the rights enumerated in the statute * * *." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 426 (emphasis in original).[33]

That Congress was addressing racial motivation—not racial groups—is further underscored by the concern expressed by members of Congress in the debates about the liberty and safety of Union men and

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(remarks of Rep. Shellabarger). Senator Cowan referred in the debate to "the Scandanavian races of the North." *Id.* at 499.

[32] *Id.*

[33] As Sen. Trumbull explained, "the very object and effect of the section is to prevent discrimination." Cong. Globe, 39th Cong., 1st Sess. 1758 (1866).

Republicans in the former Confederate States.[34] Congress would not have considered such persons to be protected by the 1866 Act if it intended a requirement that plaintiffs must be discriminated against because they belong to some particular race in order to state a claim. These Union loyalists were whites, discriminated against by whites, because of their support of the Union cause and of freedom and fair treatment for former slaves.[35] It was the fact that the discrimination against Union loyalists and Republicans was racial, because they advocated the rights of blacks, that gave rise to coverage. Their situations are clearly analogous to those of white advocates of civil rights for blacks who have suffered in more recent times, and who, as this Court held in *Sullivan*, are covered by the 1866 Act.

Indeed, the Reconstruction Congress anticipated that the 1866 Act was sufficiently broad and flexible

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[34] *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1833-35 (1866) (remarks of Rep. Lawrence expressing concern about Quakers who were driven out of North Carolina because of their refusal to support war effort, and Union loyalists in Virginia, Texas, Alabama and South Carolina); *id.* at 1263, 1265 (remarks of Rep. Broomall concerning persecution of Union men in the South); *id.* at 1835 (remarks of Rep. Lawrence) (torture of blacks was admittedly intended to drive out certain whites as well as blacks); *accord* Cong. Globe, 41st Cong., 2d Sess. at 3512-13 (1870) (remarks of Sen. Morton on Enforcement Act of 1870); *id.* at 3668 (remarks of Sen. Spencer).

[35] This was verified in a report on the former rebel states which General Carl Schurz prepared at the request of President Johnson and which was before the Joint Committee on Reconstruction. S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865). General Schurz linked the hostility toward Union loyalists with their support of the newly freed slaves. *See, e.g., id.* at 8-9, 26-27.

even to cover groups not then the subject of racial animus but who might become its victims in the future:

> If the people of a State should become hostile to a large class of naturalized citizens and should enact [laws restricting their civil rights], that would be prohibitory legislation.
>
> * * *
>
> This bill, in that broad and comprehensive philanthropy which regards all men in their civil rights as equal before the law, is not made for any class or creed, or race or color, but in the great future that awaits us will, if it becomes a law, protect every citizen, including the millions of people of foreign birth who will flock to our shores to become citizens and to find here a land of liberty and law.[36]

The Fourth Circuit's requirement that plaintiffs must be members of a "racially distinct group" before the protection of the statute can be afforded is contrary to the statute's history and this Court's decisions which focus instead on the nature of the conduct directed at the plaintiffs.

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[36] Cong. Globe, 39th Cong., 1st Sess. 1833 (1866) (remarks of Rep. Lawrence). *Accord McDonald*, 427 U.S. at 295-96 ("[u]nlikely as it might have appeared in 1866 that white citizens would encounter substantial racial discrimination of the sort proscribed under the Act, the statutory structure and legislative history persuade us that the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves").

B. The Fourth Circuit's Construction of the Scope of § 1982's Coverage Is Unworkable and Defeats the Purpose of the Statute.

The court of appeals erroneously assumed that there exists some definition of "race" that would give content to its requirement that plaintiffs must be "racially distinct."[37] As Judge Wilkinson showed convincingly in dissent, however, "the scientific concept of 'race' is anything but definite" and thus is a "tool all too treacherous for a court seeking to de-

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[37] The court of appeals' requirement that a plaintiff must prove he or she is a member of a "racially distinct group" is puzzling, because it does not explain *from whom* the plaintiffs must be distinct. After *McDonald*, the answer cannot be that plaintiffs must be distinct from whites, because whites themselves are covered if they are the victims of racism. And *Sullivan* makes clear that the test cannot be that plaintiffs must be "racially distinct" from defendants, because both Sullivan and the defendants were white, yet Sullivan stated a claim because the retaliation against him was racist. In dissent, Judge Wilkinson rejected the implication in the majority opinion that the answer could be provided in this case by determining whether Jews are "commonly considered" to be "racially distinct":

> One anthropologist has observed that "Jews are nearly always referred to in popular parlance as a 'race.' This is done not only by the so-called 'man in the street' but also by many scientists, medical men, philosophers, politicians, historians, and the members of many other professions." A. Montagu, *Man's Most Dangerous Myth*, at 353 (footnote omitted). Thus, there exists a real question about the breadth of the views at work in this case. If the majority insists that misperceptions be broad based for § 1982 to apply, plaintiffs should at least be given the opportunity to show the scope of the belief that they are members of a distinct race. [Pet. App. 20a.]

termine the precise coverage of federal law" (Pet. App. 18a-19a).[38]

Moreover, the Fourth Circuit's approach defeats the

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[38] In holding that a plaintiff of Puerto Rican descent could state a claim of racial discrimination under § 1981, one district court explained that "a group of scientists after developing a list of 'racial types' emphasized that the list 'of 30 'races' might have been ten or 50; the line of discrimination in many cases is arbitrary * * *.' " *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 565 (E.D. Cal. 1982) *quoting* C. Coon, S. Garn & J. Birdsell, *Races: A Study of the Problems of Race Formation in Man* 140 (1950). Another researcher has observed that "as few as three and as many as thirty-seven races have been described" in various anthropological studies. S. Molnar, *Human Variation: Races, Types, and Ethnic Groups* 16 (2d ed. 1983). In striking down the California miscegenation laws as unconstitutionally vague, the California Supreme Court observed that "[t]he number of races distinguished by systems of classification 'varies from three or four to thirty-four.' " *Perez* v. *Lippold*, 32 Cal. 2d 711, 198 P.2d 17, 27 (1948) (*en banc*) (Traynor, J., *quoting* F. Boas, 7 *Encyclopedia of Social Sciences* 25, 26 (1930)).

Because of the lack of precision in the definition of race, physical anthropologists and biologists now question seriously the usefulness and validity of the race concept. *See, e.g.*, Littlefield, Lieberman & Reynolds, *Redefining Race: The Potential Demise of a Concept in Physical Anthropology*, 23 Current Anthropology 641 (1982) (by the end of the 1970's, challenge to the race concept in American physical anthropology "had become the modal position"); M. Banton & J. Harwood, *The Race Concept* (1975) ("[r]acial classification is a hangover from an outdated phase of science which now does insidious harm"); A. Montagu, *The Concept of Race*, in *The Concept of Race*, 24 (A. Montagu ed. 1964) ("[t]here is no such thing as the kind of 'race' in which the layman believes, namely, that there exists an indisoluble association between mental and physical characters which make individual members of certain 'races' either inferior or superior to the members of certain other 'races' ").

purpose of the Act because, as Judge Wilkinson recognized, where the purpose of federal law is to root out racism, the definition that must control is that adhered to by those who perpetrate racial violence, not a taxonomical classification of the victim:

> [I]t is not scientifically authenticated views but rather distorted social perceptions that lie at the root of racial violence. "The social definition and not the biological facts actually determines the status of an individual and his place in interracial relations * * * . [T]he scientific concept of race is *totally inapplicable at the very spots where we recognize 'race problems.'* " G. Myrdal, [*An American Dilemma*] at 115 [(1944)] (emphasis in original). [Pet. App. 19a.]

Other federal courts of appeals have recognized that racist conduct, even against groups not generally regarded as "racially distinct," gives rise to the protection of the Civil Rights Act of 1866. In the same week that the Fourth Circuit affirmed the dismissal of the Congregation's complaint, the Third Circuit held in *Al-Khazraji* v. *Saint Francis College*, 784 F.2d 505, 514 (3d Cir.), *cert. granted*, 107 S. Ct. 62 (1986), that "ethnic Arabs may depend upon Section 1981 to remedy racial discrimination against them." The defendant argued that an ethnic Arab is taxonomically a Caucasian and therefore "not a protected person under Section 1981 when he is presumably claiming other Caucasians or whites were improperly favored over him." [39] The Third Circuit, however, concluded that "*McDonald* rejected the argument that Section

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[39] 784 F.2d at 514.

1981 is limited to the protection of non-whites against racial discrimination * * *. The protection against racial discrimination thus extends beyond those who are taxonomically members of the Negro race. Appellant is therefore not prevented from invoking Section 1981 merely because he is taxonomically classified as a member of the Caucasian race."[40] The court concluded from the legislative history of the 1866 Act that "Congress did not intend to limit Section 1981 solely to those who could demonstrate that they had been discriminated against because they belonged to a particular group identified and described by anthropologists. When Congress referred in the statute to 'race,' it plainly did not intend thereby to refer courts to any particular scientific conception of the term."[41] The court held that "Al-Khazraji should be allowed the opportunity to prove that the discrimination he alleges is racially motivated within the meaning of Section 1981,"[42] because:

> [W]here a plaintiff comes into federal court and claims that he has been discriminated against because of his race, we will not force him first to prove his pedigree. We are unwilling to assert that Arabs cannot be the victims of racial prejudice: "prejudice is as irrational as is the selection of groups against whom it is directed."[43]

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[40] *Id.* at 515.

[41] *Id.* at 516.

[42] *Id.* at 518.

[43] *Id.* at 517, *quoting Manzanares* v. *Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979).

The Fifth Circuit recently relied on *Al-Khazraji* in holding that a white plaintiff who alleged that she was discharged from her employment due to racial discrimination because her Iranian husband was "considered by Defendants * * * as [a] member of a race other than White" is protected under § 1981. *Alizadeh* v. *Safeway Stores, Inc.*, No. 85-2816, slip op. 9979, 9983 (5th Cir. Sept. 26, 1986). The court considered "whether a woman who is married to an Arab and who has been discriminated against because her husband is considered by a prejudiced person to be nonwhite is entitled to the protection of § 1981."[44] Relying on *Al-Khazraji*,[45] the court recognized that

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[44] *Id.* at 9983. The court relied on *Faraca* v. *Clements*, 506 F.2d 956 (5th Cir.), *cert. denied*, 422 U.S. 1006 (1975), for the proposition that § 1981 "provides a cause of action to a white spouse who alleges that he was discriminated against in employment because of his marriage to a nonwhite." *Alizadeh*, No. 85-2816, slip op. at 9983.

[45] The court in *Alizadeh* quoted the *Al-Khazraji* court's statement that "Congress's purpose [in the 1866 Act] was to ensure that all persons be treated equally, without regard to color or race, which we understand to embrace, at the least, membership in a group that is ethnically and physiognomically distinctive." *Alizadeh*, slip op. at 9984-85, *quoting Al-Khazraji*, 784 F.2d at 517. Although the appearance, or physiognomy, of a plaintiff is a factor that might be offered in support of a claim that a defendant's conduct was racially motivated and thus prohibited by the 1866 Act, a "racially distinctive" appearance should not be a prerequisite of coverage. Such a requirement would run afoul of *McDonald* and thrust courts once again into the unseemly exercise of determining which persons look sufficiently "different" to be covered. Tests based on color or appearance conjure up the very evils that civil rights statutes attempt to prevent. In the *Nuremberg Diary*, G.M. Gilbert describes Julius

"[a]nthropologists classify Arabs as Caucasians" but rejected "a taxonomical definition of race" as not "in keeping with the rationale of *McDonald*."[46]

This Court should reverse the Fourth Circuit's decision to force the federal courts "into the business" of making racial determinations that encourage "precisely the kind of stereotyping which the civil rights statutes were designed to prevent."[47] Instead, the Court should hold, consistent with its decisions that

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Streicher's boasts that he could judge race by appearance:

> "They are crucifying me now," he said confidentially. "I can tell. Three of the judges are Jews."
>
> "How can you tell that?"
>
> "I can recognize blood. Three of them get uncomfortable when I look at them. I can tell. I've been studying race for 20 years. The body structure shows the character. I'm an authority on that subject. Himmler thought he was, but he didn't know anything about it. He had Negro blood himself."
>
> "Really?"
>
> "Oh yes," he grinned triumphantly, "I could tell it by his head shape and hair. I can recognize blood."

G.M. Gilbert, *Nuremberg Diary* 43 (1947).

Any test based on "ethnic" groups is doomed to the same confusion as a test based on a taxonomic definition of "race" because the two terms are so often used interchangably. *See* Black's Law Dictionary 1132 (5th ed. 1979) (defining "race" as: "An ethnical stock * * *").

[46] *Alizadeh*, slip op. at 9984. *Accord Manzanares* v. *Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979).

[47] *Khawaja* v. *Wyatt*, 494 F. Supp. 302, 305 n.1 (W.D.N.Y. 1980). *See also* Note, *Who Is a Negro?*, 11 U. Fla. L. Rev. 235 (1958); Note, *Racial Designation in Louisiana: One Drop of Black Blood Makes a Negro!*, 3 Hastings Const. L.Q. 199 (1976).

"[u]nder [the] language [of § 1982], a person's race is irrelevant to the existence of the declared rights,"[48] petitioners are not barred by a test of "racial distinctiveness" from the protection of § 1982 for the racist attack on their place of worship.

C. The Holding of the Court of Appeals Leaves Victims of Racist Attacks and Discrimination Unprotected by the Civil Rights Acts.

Contrary to the court of appeals' assumption that the racist acts and attitudes toward Jews displayed in the desecration of petitioners' synagogue are unusual, violence and discrimination based on the erroneous premise that Jews are a separate race is not just an historical artifact but a contemporary reality. Failure to reverse the court of appeals will signal federal tolerance for a menace that is all too prevalent.

The National Socialist Party of America holds among its "fundamental principles" belief in "The Jew as the Ultimate Enemy." The official party newspaper expresses this principle in the following terms:

> The single serious enemy facing the White man is the Jew. The Jews are not a religion, they are an Asiatic *race*, locked in mortal conflict with Aryan man which has lasted for millennia, and which will continue until one of the two combat peoples is extinct.[49]

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[48] *City of Memphis* v. *Greene*, 451 U.S. 100, 130-31 (1981) (White, J., concurring). *Accord Burnett* v. *Grattan*, 468 U.S. 42, 50 (1984) ("[t]he statutes [the Civil Rights Acts] are characterized by broadly inclusive language. They do not limit who may bring suit").

[49] H. Covington, *10 Fundamentals of National Socialism*, The New Order 3 (Mar. 1979) (emphasis in original).

In perpetrating hate violence, neo-Nazis have identified Jews as targets because Jews are perceived as non-white. For example:

> [I]n Houston, Texas, in December, 1977, the local unit of the National Socialist White Workers Party, through its recorded telephone message, offered an award of $5,000 "for every non-white killed during an attack on a white person." Defending the award, Nazi spokesman Dennis Milem stated it was time "for an all-out war for whites against non-whites, and that includes Jews."[50]

Neo-Nazi hate literature in the United States is rife with racist references to Jews. For example, *Aryan Nations*, the official publication of a neo-Nazi group of the same name, has exhorted its readers: "Aryans Awake! Jews are the Race of Satan!"[51] The magazine explains the program of the Aryan Nations movement in the following manner:

> There is no hope for the White race, if it does not immediately come to the grim realization that the Jewish powers who presently rule over the Western nations desire and work toward the absolute destruction of White men everywhere. The Jews and their surrogates * * * try to force mongrelization of the White race, especially in Britain and America: from racial bastardization there can

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[50] Anti-Defamation League of B'nai B'rith, 24 Facts 7 (March 1978).

[51] *Aryan Nations*, No. 30, at 8 (R. Butler ed. 1983).

> be no hope of return to genetic purity and vitality.[52]

These attitudes, and the violence they foster, demonstrate why Jews need the protection of the federal Civil Rights Acts. That Jews are, in fact, not a racial group has never protected them from being a target of racially-motivated violence. The Anti-Defamation League of B'nai B'rith reported 638 incidents of anti-Semitic vandalism against Jewish institutions and private Jewish homes and businesses in 34 states and the District of Columbia in 1985; Maryland ranks fifth in such incidents. *See* Anti-Defamation League of B'nai B'rith, *1985 Audit of Anti-Semitic Incidents* 1, 5 (1986). Other indications of the seriousness of the problem include the violent actions of a neo-Nazi group called "The Order" and the activities of other organized anti-Jewish hate groups including neo-Nazi groups, the KKK, and the Posse Comitatus.[53]

Montgomery County, Maryland, the location of Shaare Tefila, has all too frequently seen such acts of anti-Semitic hate violence. The Montgomery County Maryland Human Relations Commission reports that 195 hate violence incidents (including harassment, vandalism, assault, arson and cross-burning) occurred in the County in 1985, compared with 151 such incidents in 1984.[54] Jews were the target in 68 incidents

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[52] *Aryan Nations*, No. 32, at 7 (R. Butler ed. 1983).

[53] *See, e.g., Neo-Nazis Inspire White Supremacists*, Washington Post, Dec. 26, 1984, at A3, col. 1.

[54] Montgomery County [MD] Human Relations Commission, *Montgomery County Government Hate/Violence Incidents Fact Sheet* (Oct. 20, 1986).

in 1985 and 67 in 1984.[55] In addition, 118 incidents have occurred in 1986 (through October 17, 1986), of which 53 were directed at Jews.[56] The graphic display of Nazi and other racist symbols is not unique to the Shaare Tefila desecration.[57]

It is not enough to say, as Judge Murnaghan did in concurrence, that the state courts can handle such affronts to the civil rights of Jewish people (Pet. App. 10a). The 1866 Act was "intended at the very least to supplement state laws. *See Jones*, 392 U.S. at 426-36" (Pet. App. 22a) (Wilkinson, J., dissenting).[58] The Civil Rights Act of 1866 was intended to provide a remedy for precisely the kind of terror and harass-

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[55] *Id.*

[56] *Id.*

[57] *See Local Anti-Semitic Acts More Violent*, Washington Post, Sept. 21, 1985, at B6, col. 1 ("Anti-Semitic incidents in affluent Montgomery County are getting more violent and account for about 75 percent of all reported racial violence in the county, officials said this week"); *Anti-Semitic Incidents Called More Violent*, Montgomery Journal, Sept. 19, 1985, at A5, col. 1. The incidents described included the desecration of a Jewish Community Center building near an orthodox synagogue, with five-foot high swastikas, and an elementary school, with swastikas and the slogans "Hitler youth" and "Jews must die." A synagogue in neighboring Prince George's County also was recently desecrated. Anti-Defamation League of B'nai B'rith, *1985 Audit of Anti-Semitic Incidents* 4 (1986); *Laurel Synagogue is Defaced*, Washington Post, Sept. 16, 1985, at D5, col. 4.

[58] *See* Cong. Globe, 39th Cong., 1st Sess. 1415 (1866) (remarks of Sen. Davis, an opponent of the Act, complaining that § 1 would "harmonize" the laws of the states); *id.* at 1118 (remarks of Rep. Wilson, a proponent of the Act, that "the practice of the states leaves us no avenue of escape, and we must do our duty by supplying the protection which the states deny").

ment inflicted in this case; the activities of the Ku Klux Klan, whose symbols the respondents appropriated here, were a particular focus of Congressional concern.[59]

Moreover, Judge Murnaghan is simply not correct in assuming that remedies for the conduct at issue here are available under state law. State criminal statutes generally—and Maryland criminal statutes specifically—provide no compensation for the victims and depend to a large degree upon prosecutorial discretion.[60] Most important, state tort and common law

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[59] *See* Cong. Globe, 41st Cong., 2d Sess. 3668 (1870) (remarks of Sen. Spencer, condemning the acts of the Ku Klux Klan); *id.* at 3808 (remarks of Sen. Stewart, also regarding the Ku Klux Klan); *id.* at 3611 (remarks of Sen. Pool, condemning "organizations which committed outrages, which went through communities for the purposes, of intimidating and coercing classes of citizens in the exercise of their rights").

[60] The inadequacy of state criminal remedies is illustrated by the record of criminal prosecutions of the respondents here. Six respondents were indicted for their acts on the night of November 1, 1982. Only two of eight counts in the indictments related directly to the synagogue desecration: one count for destruction of property and one count for conspiracy to commit malicious destruction of property. The prosecution entered a *nolle prosequi* against one of the respondents. *See* Circuit Court for Montgomery County, Maryland, Crim. No. 29908 (Thomas Lloyd Heine). Three pleaded guilty to single counts unrelated to the synagogue desecration and received suspended sentences. *See* Circuit Court for Montgomery County, Maryland, Crim. Nos. 29914 (John William Cobb), 29907 (Thomas Joseph Hunt, Jr.), 29918 (Dominic Maurice Queen). One respondent pleaded guilty to two counts, including the count for conspiracy to commit malicious destruction of property, and received a sentence of three years with all but 120 days suspended. *See* Circuit Court for Montgomery County, Maryland, Crim. No. 29909 (William

remedies largely ignore the racist character of the acts. A prosecution for destruction of property or a civil suit for trespass simply does not convey to the perpetrators of these acts that it is the racist character of the acts—and the resulting injury to individual dignity—that society deplores, not just damage to property.

It is a reproach to our legal system that a federal court of appeals should regard the racially-motivated desecration of Shaare Tefila's synagogue as no more than a garden variety trespass and that the penalty for writing "DEATH TO THE JUDE" and "IN, TAKE A SHOWER JEW" on the walls of a synagogue is no different from the penalty for writing ordinary graffiti on the side of an office building. For this Court to reiterate that holding would only give aid and comfort to those who act on racial biases that tear at the fabric of our society.

Randall Harris). A single respondent was tried and convicted on the two counts relating to the synagogue desecration. *See* Circuit Court for Montgomery County, Maryland, Crim. No. 29903 (Michael David Remer). He received three-year concurrent sentences on those counts. One of the conditions of his probation was that he provide 300 hours of service to Jewish charity. *Id.*, Order for Probation, Sept. 2, 1983. That requirement was changed to 300 hours of service to the community generally when he requested that he not be required to work for Jews. *See id.*, Letter to Hon. David L. Cahoon from Walter B. Sizemore, March 14, 1986; Order, May 15, 1986. This unrepentant attitude, as well as the continued belief by respondents that Jews are racially distinct which is illustrated in the deposition testimony cited at pp. 8-9, *supra*, shows why a federal civil rights claim is so important to victims. It confronts the perpetrators of these acts on the issue of racism. It is racism, not damage to property, which is the truly offensive and destructive element of the conduct.

CONCLUSION

For all of the foregoing reasons, the decision of the United States Court of Appeals for the Fourth Circuit should be reversed, and the Congregation should be given the opportunity to prove its claims under the federal Civil Rights Acts, 42 U.S.C. §§ 1982 and 1985(3).

Respectfully submitted,

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No. 85-2156

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

v.

JOHN WILLIAM COBB, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT MICHAEL DAVID REMER

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QUESTION PRESENTED

Was the court below correct in affirming the dismissal of the plaintiffs' claim under 42 U.S.C. § 1982 since discrimination against Jews is not race discrimination within the meaning of that statute, regardless of the subjective, irrational perceptions of the defendants?

PARTIES TO THE PROCEEDING

The appellants in the court of appeals (now petitioners) were Shaare Tefila Congregation, Rabbi Martin S. Halpern, Shirley Altman, William Harkaway, Marshall S. Levin, Maurice Potosky and Dr. Jacob Teller. The appellees in the court of appeals (now respondents) were John William Cobb, William Randall Harris, Thomas Lloyd Heine, William Hess, Thomas Joseph Hunt, Jr., Raymond Lee Jordan, Dominic Queen and Michael David Remer. Only Michael David Remer, through court-appointed counsel, was an active appellee before the court of appeals. Mr. Remer now is a respondent before this Court, which has granted him leave to proceed *in forma pauperis*.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. A. 1a-23a, 36a-38a)[1] is reported at 785 F.2d 523. The opinion of the United States District Court for the District of Maryland (Pet. A. 24a-35a) is reported at 606 F. Supp. 1504.

RELEVANT STATUTORY PROVISIONS

42 U.S.C. § 1982 (1982)

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Civil Rights Act of 1866
Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any

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[1] "Pet. A." references are to pages of the Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. "J.A." references are to pages of the Joint Appendix.

law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

RELEVANT CONSTITUTIONAL AMENDMENT

U.S. Const. amend. XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

STATEMENT OF THE CASE

On March 6, 1984, the Shaare Tefila Congregation and several of its members and employees[2] filed this civil action in the United States District Court for the District of Maryland against eight individual defendants. The complaint (Pet. A. 39a) asserted various federal and state claims arising from the alleged desecration of the synagogue of the Shaare Tefila Congregation in Silver Spring, Maryland. Federal jurisdiction was sought over claims under the federal civil rights statutes, 42 U.S.C. §§ 1981, 1982 and 1985(3), as well as over pendent state law claims for trespass, nuisance and intentional infliction of emotional distress.

In the complaint, the Congregation asserted that the defendants conspired to desecrate and did desecrate the synagogue of the Shaare Tefila Congregation. (Pet. A. 43a). The defendants allegedly painted various anti-Semitic words and symbols on the outside walls of the synagogue. (Pet. A. 43a). The complaint also alleged that the

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[2] The plaintiffs (now petitioners) sometimes will be referred to collectively herein as "the Congregation."

"[d]efendants' desecration of the synagogue was motivated by racial prejudice in that defendants perceive plaintiffs as racially distinct because they are Jews." (Pet. A. 45a).

One of the defendants, Michael David Remer, by court-appointed counsel, filed a motion to dismiss the plaintiffs' complaint under Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure. In opposing that motion, the Congregation presented excerpts from deposition testimony and three affidavits, accompanied by exhibits, in support of the factual allegations contained in the complaint. (Pet. A. 49a-75a). The deposition testimony and affidavits described the vandalism, the history of anti-Semitism and the defendants' alleged irrational misapprehensions of Jews as members of a distinct and inferior race.

The Congregation contends that the district court, and presumably, the Fourth Circuit, erred in excluding the voluminous extra-pleading materials which it submitted relating to its anticipated proof. (Brief for the Petitioners, 9, n.16). However, in deciding the motion to dismiss, the district court clearly assumed the truth of all of the uncontroverted factual allegations in the complaint. (Pet. A. 26a). Under the circumstances, it was unnecessary for the plaintiffs to prove their allegations, and, as noted by the district court, the extra-pleading materials did not "facilitate the disposition of this action." (Pet. A. 24a, n.1). Even if all of the facts contained in those materials are accepted as true, they do not better the Congregation's jurisdictional position under the federal civil rights acts.

On April 22, 1985, the district court granted defendant Remer's motion to dismiss the Section 1982 claim,[3] hold-

[3] The district court also dismissed the plaintiffs' other civil rights

ing that the plaintiffs' allegations of racial misperceptions by the defendants did not constitute race discrimination within the meaning of that statute:

> The Court is unwilling to adopt an interpretation which relies so entirely on the idiosyncracies [sic] of individual defendants in civil rights cases. As defendant notes, such an approach would have the practical effect of extending § 1981 and § 1982 to apply to any group, however defined, merely by virtue of alleging that an individual defendant perceived the group as racially inferior, however irrational that perception might be.

(Pet. A. 30a). In determining the race discrimination covered by the statute, the district court focused on the "racial background" of the plaintiffs, rather than on the "racial perceptions" of the defendants. (Pet. A. 30a-31a). It noted the plaintiffs' agreement that "Jews do not constitute a distinct or recognizable 'race' and are not commonly identified as such." (Pet. A. 31a). Consequently, the district court held that, despite the distorted beliefs of certain deviant groups, "discrimination against Jews is not race discrimination within the meaning of the statutes in question." (Pet. A. 31a). Although the motion to dismiss was filed on behalf of only one defendant, the district court found that its decision to decline jurisdiction required dismissal of the action against all of the defendants. (Pet. A. 34a).

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claims, holding that: (1) the complaint did not allege the requisite state action under Section 1981's "full and equal benefit" clause (Pet. A. 26a-29a), and (2) the complaint did not allege the requisite violation of federal predicate rights under Section 1985(3). (Pet. A. 31a-34a). In light of its dismissal of all of the federal claims, the district court also dismissed the plaintiffs' pendent state claims. (Pet. A. 34a).

Contrary to the plaintiffs' contentions, the district court did not find that the defendants did not act out of racial prejudice (Brief for the Petitioners, 9), nor did it find that Jews never could state a claim under Sections 1981 and 1982. (Brief for the Petitioners, 10). It simply attempted to determine the statute's coverage and to apply that coverage to the facts in this case. It found that the statute was addressed to discrimination based on "racial background" and that the plaintiffs in this case had not sought "judicial recognition of a Jewish racial identity." (Pet. A. 30a). Accordingly, the district court dismissed the plaintiffs' Section 1982 claim because the complaint did not allege discrimination based on race within the meaning of that statute.

The United States Court of Appeals for the Fourth Circuit affirmed the district court's decision on March 7, 1986. (Pet. A. 1a-23a, 36a-38a). Writing for the Court, Judge Hall upheld the district court's dismissal of the plaintiffs' Section 1982 claim,[4] stating:

> We . . . find nothing in the statute, its legislative history, or subsequent case law which would lead us to conclude that section 1982 was intended to apply to situations in which a plaintiff is not a member of a racially distinct group but is merely *perceived* to be so by defendants.

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[4] The Fourth Circuit unanimously affirmed the other holdings of the district court that: (1) the plaintiffs had failed to allege a claim under Section 1981's "full and equal benefit" clause because no state action was involved in the defendants' acts (Pet. A. 4a-5a), and (2) the plaintiffs had failed to allege a violation of any of the predicate rights upon which Section 1985(3) claims may be based. (Pet. A. 7a-9a). In its Petition for Writ of Certiorari, the Congregation did not seek this Court's review of the lower courts' holdings under Sections 1981 and 1985(3).

(Pet. A. 6a) (emphasis in original). The Fourth Circuit agreed with the district court that race discrimination under Section 1982 cannot be determined only by reference to "the subjective, irrational perceptions of defendants." (Pet. A. 7a). Concluding that "discrimination against Jews is not racial discrimination" under Section 1982, and that Section 1982 "does not address discrimination on account of religion or national origin," the court of appeals upheld the district court's dismissal. (Pet. A. 7a).

Judge Murnaghan, concurring with Judge Hall, recognized the "regrettable consequences" which would result from the plaintiffs' proposed extension of Section 1982's coverage. (Pet. A. 10a). He suggested that the plaintiffs' legal theory would lead to myriad, federal civil rights suits arising out of various defendants' misperceived notions of the racial identity of others. For example, the conflict between Irish Catholics and Protestants, based on ill-conceived notions of racial inferiority, would be covered by the civil rights acts. Rejecting such a broad statutory coverage, Judge Murnaghan nonetheless expressed hope that the plaintiffs would pursue their remedies in state court. (Pet. A. 10a).

Judge Wilkinson dissented from the majority's Section 1982 holding. (Pet. A. 11a-23a). He agreed that discrimination based on religion and national origin is not covered by Section 1982 (Pet. A. 13a-14a) and that "not every wrong against a Jewish citizen would be actionable under the civil rights laws." (Pet. A. 17a). However, without reference to the statute's language or its legislative history, Judge Wilkinson argued for a broad coverage of claims based on the subjective, racial misperceptions of the individual defendants in order to: (1) ensure "adequate coverage" and (2) avoid "the difficult and troubling task of drawing racial lines." (Pet. A. 21a).

First, Judge Wilkinson argued that the "[f]ederal civil rights laws protect citizens from acts of discriminatory intent" (Pet. A. 13a), and that "[t]he focus on the subjective intent of the actor reflects the reality that discrimination and prejudice is grounded in erroneous perceptions." (Pet. A. 14a). He argued that misperceptions regarding racial identity itself, as well as misperceptions regarding the relevance of racial identity (the familiar basis for the civil rights acts' coverage), should be subject to challenge under Section 1982. (Pet. A. 15a).

Second, Judge Wilkinson argued that the failure to determine Section 1982's coverage by the subjective, racial intent of the defendants "saddles the courts with the difficult and inappropriate burden of delineating racial distinctions in a context where they are irrelevant and unnecessary." (Pet. A. 18a). Curiously, in support of the racial intent standard, the dissent cited several other areas of the law, most notably Title VII and the Fourteenth Amendment, where such "difficult and inappropriate" racial classifications are commonplace. (Pet. A. 14a). Judge Wilkinson criticized the majority for failing to offer any guidance in defining an objective race standard, even though, in this case, the courts and counsel agreed that "Jews are not, under any legitimate view, a distinct race, but are in fact members of a religious community with a rich cultural heritage." (Pet. A. 15a). Finally, Judge Wilkinson criticized Judge Murnaghan's reference to the availability of state law remedies. (Pet. A. 22a). Without denying the availability of state remedies or carefully analyzing the language and legislative history of Section 1982, he argued that federal law should provide a federal remedy for civil rights violations such as those in this case.

On October 6, 1986, this Court granted the Congregation's petition for a writ of certiorari on the issue of

whether any citizen who suffers injury as a result of wrongdoing which is motivated by an erroneous racial intent is entitled to invoke the jurisdiction of the federal courts to recover damages under Section 1982.[5] (J.A. 87).

The reprehensibility of the acts of the defendants described in the complaint, as well as the irrationality of their political and sociological perceptions described in the complaint, cannot be gainsaid. The question is not whether the plaintiffs are entitled to pursue a remedy—the question is whether the remedy is to be found in 42

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[5] Although the writ of certiorari was sought and granted only with respect to the Fourth Circuit's Section 1982 holding, the Congregation contends that, if this Court overturns that holding, the plaintiffs' Section 1985(3) claim also must be resurrected. (Brief for the Petitioners, 11, n. 17). In that regard, the Fourth Circuit held that the plaintiffs had not alleged the violation of predicate federal rights which is required to state a claim under Section 1985(3). It suggested that violations of Sections 1981 and 1982 could have formed a sufficient basis for a Section 1985(3) conspiracy claim. (Pet. A. 9a). Indeed, the Fourth Circuit previously has indicated that federal statutory violations constitute deprivations of "equal protection of the laws" or "equal privileges and immunities under the laws" which give rise to liability under Section 1985(3). *McNutt* v. *Duke Precision Dental and Orthodontic Laboratories, Inc.*, 698 F.2d 676, 679-80 (4th Cir. 1983). However, contrary to the plaintiffs' argument (Brief for the Petitioners, 11, n. 17), this Court never has held that Section 1985(3)'s protection can be extended beyond the violation of federal constitutional rights. In the case cited by the plaintiffs, *Great American Federal Savings & Loan Association* v. *Novotny*, 442 U.S. 366 (1979), this Court held that a plaintiff may not base a Section 1985(3) action on a violation of Title VII. In separate concurrences, both Justices Powell and Stevens took the position that Section 1985(3) only provides a remedy for violations of federal constitutional rights. *Novotny*, 442 U.S. at 379, 385. For a persuasive argument that Section 1985(3) only should address the violation of federal constitutional rights, see Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. Chi. L. Rev. 402 (1979).

U.S.C. § 1982. The Fourth Circuit directed the plaintiffs to other non-federal remedies because it correctly found "nothing in the statute, its legislative history, or subsequent case law" which supports an extension of Section 1982 "to apply to situations in which a plaintiff is not a member of a racially distinct group but is merely *perceived* to be so by defendants." (Pet. A. 6a) (emphasis in original).

SUMMARY OF ARGUMENT

The Jewish plaintiffs sued the defendants under 42 U.S.C. § 1982 to recover for the desecration of their synagogue. This Court has held that the protection of Section 1982 extends only to "a limited category of rights, specifically defined in terms of racial equality." *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966). Recognizing that religious discrimination is not covered by Section 1982, the plaintiffs sought to characterize their religious claim as a race discrimination claim by arguing that the defendants were motivated by the erroneous belief that Jews are members of a distinct and inferior race. The district court and the court of appeals correctly held that the plaintiffs' novel definition of race discrimination under the statute is unsupported by its specific language, its legislative history, or the cases construing it.

Section 1982 guarantees to all citizens the same right to hold real and personal property "as is enjoyed by white citizens." The parties to this litigation agree that the statute addresses only race discrimination, and that Jews are not members of a distinct racial group. However, the Congregation contends that race discrimination under the statute can be determined solely by examining the subjective intent of the perpetrators, without reference to the actual race of the plaintiffs. The specific language of

the statute and its legislative history, as interpreted by this Court, show otherwise. The statute was enacted in the Reconstruction era pursuant to the Thirteenth Amendment in an effort to achieve racial equality by protecting citizens from different treatment based on their race. Accordingly, this Court has held that both blacks and whites are protected from such differential treatment based on race. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968). This Court's analysis of the statute's coverage always has emphasized the protection of different racial groups from discrimination. That analysis never has rested on an evaluation of the defendants' subjective intent standing alone.

This Court's interpretation of the coverage of Section 1982 is perfectly consistent with the approach taken by Congress, the federal administrative agencies, and the courts in other areas of modern discrimination law. Title VII, Title VIII, the Voting Rights Act, the Fourteenth Amendment and 42 U.S.C. § 1985(3) all require reference to racial distinctions in order to prove race discrimination. Thus, the Congregation's argument that its approach must be accepted by this Court because race cannot be defined flies in the face of the many other areas of discrimination law in which race routinely is defined.

No one can deny that the complaint in this case alleges grievous wrongs. However, neither the despicable nature of the defendants' alleged conduct, nor the plaintiffs' dissatisfaction with the available state remedies, is a sufficient basis for this Court to create a new federal cause of action. If a new federal remedy is to be created, it must be done by Congress.

ARGUMENT

THE COURT OF APPEALS CORRECTLY UPHELD THE DISMISSAL OF THE CONGREGATION'S CLAIM FOR THE DESECRATION OF ITS SYNAGOGUE UNDER 42 U.S.C. § 1982 BECAUSE THE RACE DISCRIMINATION COVERED BY THAT STATUTE CANNOT BE ESTABLISHED BY REFERENCE TO THE DEFENDANTS' IRRATIONAL AND INACCURATE PERCEPTIONS OF RACE.

A. The Language And Legislative History Of Section 1982, As Interpreted By This Court And By The Lower Federal Courts, Indicate That The Statute Covers Discrimination Based On A Plaintiff's Race And Color And Not Discrimination Based Solely On A Defendant's Erroneous Perceptions Of The Plaintiff's Racial Identity.

The Congregation sued the defendants under 42 U.S.C. § 1982 for the desecration of its place of worship. That statute addresses race discrimination and not religious discrimination. The Congregation concedes that Jews are a religious, not a racial, group. In order to avoid being foreclosed from pursuing what is essentially a religious discrimination claim, the Congregation seeks to stretch the meaning of race discrimination beyond its accepted meaning of discrimination against a racially distinct group to encompass all actions which are motivated by racial prejudice. It argues that the coverage of Section 1982 can be determined by the perpetrators' erroneous perceptions of racial identity. This "misperception" standard is not supported by Section 1982's language, its legislative history or the case law construing the statute.

As recognized by this Court on many occasions, the starting point in every case involving construction of a statute must be the statutory language itself. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976); *Tennessee*

Valley Authority v. *Hill*, 437 U.S. 153, 173 (1978); *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). That principle of statutory construction is no less applicable here when the statute at issue—42 U.S.C. § 1982—is a short, general statute which was enacted more than a century ago. The temptation to bypass consideration of the explicit thrust of Section 1982's language, in an attempt to remedy what is admittedly a grievous wrong, must be avoided.

Section 1982 provides:

> All citizens of the United States shall have the same right, in every State and Territory, *as is enjoyed by white citizens* thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982 (1982) (emphasis added). The Congregation agrees that the above language does not prohibit religious discrimination and that Jews are not members of a distinct race. (Brief for the Petitioners, 13). However, it contends that Section 1982 covers the synagogue's desecration because the defendants' actions were motivated by an erroneous belief that Jews are a distinct and inferior race. The statute contains no language to support the Congregation's novel theory that a Section 1982 claim can rest solely upon the erroneous racial intent of the perpetrators.

To the contrary, as this Court has recognized, the statutory language, "as is enjoyed by white citizens," emphasizes "the racial character of the rights being protected." *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966). Significantly, the statute itself refers to a physical characteristic—white skin color—in defining that racial character. The statutory language thus addresses discrimination based on race, as determined by an immutable physical charac-

teristic. The language of Section 1982 as it originally was enacted in the Civil Rights Act of 1866 also addresses race discrimination in terms of skin color:

> [A]ll . . . citizens, of every *race and color*, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, . . . to . . . hold . . . real and personal property, . . . as is enjoyed *by white citizens*. . . .

Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (emphasis added). As originally enacted, the statute guaranteed equal treatment to all citizens regardless of race and color.

In arguing for their misperception standard, the plaintiffs misconstrue the statute's guarantee of racial equality to all citizens "of every race and color."[6] They make the disingenuous argument that, because the statute applies to "all" persons, not just to selected races, it could not have been intended to address only discrimination based on a person's race. (Brief for the Petitioners, 18-21). The defendants have no quarrel with the Congregation's argument that Section 1982 extends equal protection to persons of every race and color. However, by the clear terms of the statute, that protection constitutes protection from different treatment based on one's race, not protection from every act which is motivated by racial prejudice without reference to the racial characteristics of the plaintiffs.

The Congregation's discussion of the legislative history is aimed at bolstering the same disingenuous argument described above. For example, it cites portions of the

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[6] In fact, the plaintiffs delete the critical language "of every race and color," when they quote the 1866 Act in their argument. (Brief for the Petitioners, 16, n. 19).

legislative history which establish that "Congress did not conceive of the bill as a protection for any specified group of 'races'." (Brief for the Petitioners, 20). In fact, much of the Congregation's discussion of the statute's legislative history is directed at showing what no one denies—that the protection of the 1866 Act extends to all races. (Brief for the Petitioners, 19, 20, n.30, 21, 23). Without question, the statute protects all persons from different treatment based on their race, whatever that race may be.

The legislative origins of Section 1982 support the proposition that the statute protects against discrimination on account of one's race. Section 1982, like Section 1981, originated in the first section of the Civil Rights Act of 1866.[7] *Tillman* v. *Wheaton-Haven Recreation Association*, 410 U.S. 431, 439 (1973). At the time of that statute's enactment, the Thirteenth Amendment to the U.S. Constitution had been ratified, but the Fourteenth Amendment had not. Accordingly, the constitutional basis for Section 1982, as originally enacted, was the Thirteenth Amendment, which abolished slavery. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437-38 (1968).

The legislative history of Section 1982 definitively shows that the statute was designed to protect blacks from discrimination because of their race. After passage of the Thirteenth Amendment abolishing slavery, the 39th Congress recognized the need for legislation to protect and extend the rights of the newly freed slaves.

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[7] Given their common origin, Sections 1981 and 1982 appropriately are construed in an analogous fashion. *Runyon* v. *McCrary*, 427 U.S. 160, 171 (1976); *Tillman* v. *Wheaton-Haven Recreation Association*, 410 U.S. 431, 440 (1973). Accordingly, cases involving both Sections 1981 and 1982 are discussed herein because those sections should be construed in the same way when evaluating whether they are applicable to discrimination based on the individual discriminators' erroneous racial perceptions.

Accordingly, the Civil Rights Act of 1866 was passed to protect the racial equality of the newly freed blacks.[8] Cong. Globe, 39th Cong., 1st Sess. 322, 474, 503-04, 1151 (1866).

Section 1982's intended application to discrimination on account of one's race also is indicated by the remarks of its draftsmen in the 39th Congress. For example, as noted by the Congregation (Brief for the Petitioners, 20, n.30), Senator Johnson described the scope of Section 1 of the 1866 Act as follows:

> [N]o State shall discriminate at all between any inhabitants within her limits *on account of any race* to which they may belong, whether white or black. . . .

Cong. Globe, 39th Cong., 1st Sess. 505 (1866) (emphasis added). The legislative history contains numerous references to the 1866 Act's objective of guaranteeing racial equality by prohibiting discrimination on account of race and color.[9] By contrast, the Congregation has cited no

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[8] For a thorough discussion of the legislative history of the Civil Rights Act of 1866, see Comment, *Developments in the Law—Section 1981*, 15 Harv. C.R. C.L. L. Rev. 29, 35-64 (1980).

[9] Senator Trumbull, the author of the 1866 Act, noted that the Act would have no effect in states "where all persons have the same civil rights *without regard to color or race*," and would "have no operation in the State of Kentucky when her slave code and all her laws discriminating between persons *on account of race or color* shall be abolished." Cong. Globe, 39th Cong., 1st Sess. 476 (1866) (emphasis added). Senator Trumbull further stated that the Act will "break down all discrimination between black men and white men." *Id.* at 599. Representative Wilson, the Republican floor manager of the bill in the House, noted that the "bill rests on the discrimination relative to civil rights and immunities . . . *on 'account of race, color,* or previous condition of slavery.'" *Id.* at 1118 (emphasis added). Repre-

legislative history discussion which supports its theory that Section 1982 was intended to reach all actions motivated by racial prejudice without reference to an individual's race.[10]

The century-old legislative history of the Civil Rights Act of 1866 is confusing, disjointed and ambiguous in

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sentative Wilson further noted that the bill "secures to citizens of the United States equality in the exemptions of the law. . . . Whatever exemptions there may be shall apply to all citizens alike. One race shall not be more favored in this respect than another." *Id.* at 1117. Senator Howard stated that the bill "gives to persons who are of different races or colors the same civil rights." *Id.* at 504. Representative Shellabarger stated that the bill's "whole effect is to require that whatever rights . . . the States may confer upon one race or color of the citizens shall be held by all races in equality. Your State may deprive women of the right to sue or contract or testify. . . . But if you do so, or do not so as to one race, you shall treat the other likewise. . . . It secures—not to all citizens, but to all races as races who are citizens—equality of protection in those enumerated civil rights which the States may deem proper to confer upon any races." *Id.* at 1293. In discussing the bill, Representative Cook emphasized that, with respect to basic civil rights, Congress must provide that there be no discrimination" *on account of race or color.*" *Id.* at 1124 (emphasis added). Finally, in vetoing the bill, President Johnson described it as attempting to fix "a perfect equality of the white and black races." *Id.* at 1679.

[10] The Congregation claims that the draftsmen's concern for protecting whites who advocated the rights of the newly freed blacks supports its misperception standard. (Brief for the Petitioners, 21-22). The Congregation overlooks the fact that, in extending protection to whites who advocated the civil rights of blacks, the 39th Congress still was focusing on achieving racial equality with reference to the race of individuals. The draftsmen simply decided that they wished to protect those persons who sought to protect others from discrimination based on race. For a further discussion of the Congregation's argument in the context of this Court's cases permitting whites to sue to vindicate the rights of blacks, see Brief for Respondent Michael David Remer, *infra* at 23.

many respects. However, there is no indication in that history that the draftsmen intended anything other than race to be the touchstone for the Act's coverage; the statute was intended to achieve equality among the races. The legislative history simply does not support the misperception standard which has been fashioned out of whole cloth by the plaintiffs.

As illustrated above, in enacting the Civil Rights Act of 1866, the 39th Congress did not intend Section 1982 to cover acts motivated by completely erroneous perceptions of racial identity. Under the circumstances, if the Congregation wishes to secure coverage of such acts under the federal civil rights laws, it must look to the current Congress, rather than to the courts, to fashion a remedy.

Contrary to the Congregation's argument (Brief for the Petitioners, 15), this Court's holdings do not suggest, much less require, the Congregation's interpretation of Section 1982's coverage. Rather, those holdings make the tacit assumption that the statutory protection is based on race. In *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966), this Court determined the statute's coverage as follows:

> The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, *specifically defined in terms of racial equality.*

Id. (emphasis added). Since *Georgia* v. *Rachel*, this Court has established certain aspects of Section 1982's coverage of race discrimination. For example, it has held that Sections 1981 and 1982 protect the right of black Americans to be free from racial discrimination, whether public or private. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *Johnson*

v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975). Likewise, it has held that white Americans are protected by Section 1981's prohibition against race discrimination. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). Finally, this Court has noted, in dicta, that Sections 1981 and 1982 do not protect against religious discrimination or national origin discrimination. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 413; *Runyon* v. *McCrary*, 427 U.S. at 167.[11]

Aside from these decisions, this Court never has defined what constitutes race discrimination for purposes of Sections 1981 and 1982. However, the language of its decisions strongly suggests that those civil rights acts protect persons from different treatment based on their race and not from every act which is motivated by racial prejudice.

Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), provides a good starting point in analyzing this Court's understanding of Section 1982's coverage. In *Jones*, this Court held that a private plaintiff could sue private defendants under Section 1982 for refusing to sell him a

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[11] Throughout this litigation, the Congregation has conceded that religious discrimination is not covered by Section 1982. Furthermore, the lower federal courts have refused to extend the statute to encompass claims of discrimination on religious grounds. *Weiss* v. *Willow Tree Civic Association*, 467 F. Supp. 803, 815-16 (S.D. N.Y. 1979) (the district court rejected the Section 1982 claim of a group of Hasidic Jews who, like the plaintiffs in this case, sought to characterize their religious claim as a race claim). *See also Budinsky* v. *Corning Glass Works*, 425 F. Supp. 786, 788 (W.D. Pa. 1977) (persons of Jewish origin are not covered by Section 1981); *Wald* v. *International Brotherhood of Teamsters*, 24 Fair Empl. Prac. Cas. (BNA) 616, 619 (C.D. Cal. 1980) (claims of discrimination against Jews do not fall within Section 1981).

home solely because he was a Negro. In reaching its holding, the Court relied on its earlier decision in *Hurd* v. *Hodge*, 334 U.S. 24 (1948), striking down the judicial enforcement of racially restrictive covenants:

> *Hurd* v. *Hodge*, *supra*, squarely held, therefore, that a Negro citizen who is denied the opportunity to purchase the home he wants *"[s]olely because of [his] race and color,"* 334 US, at 34, 92 L Ed at 1194, has suffered the kind of injury that § 1982 was designed to prevent.

Jones, 392 U.S. at 419 (emphasis added). The Court noted that a Negro citizen does not have the same right to purchase real property "as is enjoyed by white citizens" so long as he can be turned away simply because he is not white. *Id.* at 421. Further emphasizing the racial equality which was the objective of the Civil Rights Act of 1866, the Court quoted the words of Senator Trumbull, the sponsor of the bill, that the bill would "break down *all* discrimination between black men and white men." *Id.* at 432, *quoting* Cong. Globe, 39th Cong., 1st Sess. 599 (1866). In finding that Congress had the power under the Thirteenth Amendment to eradicate private discrimination, the Court again noted that Negroes could not be prevented "from buying and renting property *because of their race or color.*" *Id.* at 438 (emphasis added).

> . . . [W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn *on the color of their skin*, then it too is a relic of slavery.
>
> Negro citizens . . . would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth

> Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live.

Jones, 392 U.S. at 442-43 (footnote omitted) (emphasis added).

The above language from the *Jones* decision shows that this Court always has envisioned Section 1982 as protecting individuals from discrimination because of their race. In its Brief, the Congregation ignores the obvious import of the above language and instead relies on language from that decision which is taken wholly out of context. Specifically, the Congregation quotes *Jones* for the proposition that Section 1982 was meant to prohibit "*all* racially motivated deprivations of the rights enumerated in the statute." *Id.* at 426 (emphasis in original). (Brief for the Petitioners, 15, 21). The Congregation neglects to mention that *Jones* addressed the question of whether Section 1982 applies to private, as well as public, actions. *Id.* at 413. It was in that context that this Court held that all racially motivated deprivations of rights, whether by public entities or private individuals, were covered. *Id.* at 426.[12]

This Court next addressed the scope of the Civil Rights Act of 1866 in *McDonald* v. *Santa Fe Trail Transportation*

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[12] The Congregation's misleading use of the quoted language to support its misperception standard is illustrated further by its emphasis on the words "racially motivated" and by its failure to include the entire quoted sentence in its Brief. (Brief for the Petitioners, 15). Unlike the Congregation, this Court emphasized the word "all" and stated:

> . . . § 1 [of the Civil Rights Act of 1866] was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute, although only those deprivations perpetrated "under color of law" were to be criminally punishable under § 2.

Jones, 392 U.S. at 426 (emphasis in original). *See also id.* at 436.

Company, 427 U.S. 273 (1976).[13] The Court held that Section 1981 is applicable to race discrimination against white persons, as well as nonwhite persons. However, by reaching the conclusion that both whites and nonwhites are protected, this Court did not decide that the statute's coverage could not be determined by an individual's race. To the contrary, as in the *Jones* decision, the Court assumed that the statute was intended to protect all persons, white and nonwhite, from different treatment based on their race. The specific language of the Court's holding illustrates the latter point:

> . . . [T]he Act was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts *against, or in favor of, any race.*

Id. at 295 (emphasis added).

This Court's extensive discussion of Section 1981's legislative history in *McDonald* also shows that race is the determinant of the civil rights acts' coverage. The Court emphasized that the first section of the Civil Rights Act of 1866, as originally proposed, provided: "[T]here shall be no discrimination . . . *on account of race, color, or previous condition of slavery* . . . ." *McDonald*, 427 U.S. at 288, *quoting* Cong. Globe, 39th Cong., 1st Sess. 211 (1866) (emphasis added). In discussing the significance of the language "as is enjoyed by white citizens," the Court quoted the remarks of Representative Wilson, Chairman of the Judiciary Committee and the bill's floor manager in the House, who stated that the bill "secures to citizens of

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[13] Between its decisions in *Jones* and *McDonald*, in *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459-460 (1975), this Court indicated that Section 1981 also "affords a federal remedy against discrimination in private employment *on the basis of race.*" (emphasis added).

the United States equality in the exemptions of the law. . . . *One race shall not be more favored in this respect than another.*" *McDonald*, 427 U.S. at 292-93, *quoting* Cong. Globe, 39th Cong., 1st Sess. 1117 (1866) (emphasis added). Finally, the Court quoted the following illustrative remarks of Representative Shellabarger:

> Its whole effect is to require that whatever rights as to each of those enumerated civil . . . matters the States may confer upon one race or color of the citizens shall be held by all races in equality. Your State may deprive women of the right to sue or contract or testify, and children from doing the same. But if you do so, or do not so as to one race, you shall treat the other likewise. . . . It secures—not to all citizens, but to all races as races who are citizens—equality of protection in those enumerated civil rights which the States may deem proper to confer upon any races.

McDonald, 427 U.S. at 293, n.23, *quoting* Cong. Globe, 39th Cong., 1st Sess. 1293 (1866).

Several other decisions by this Court support the conclusion that Section 1982 protects individuals from discrimination because of their race. In *Runyon* v. *McCrary*, 427 U.S. 160, 163 (1976), the Court addressed the question whether Section 1981 "prohibits private schools from excluding qualified children solely because they are Negroes." Answering that question in the affirmative, the Court stated:

> Just as in Jones a Negro's § 1 right to purchase property on equal terms with whites was violated when a private person refused to sell to the prospective purchaser solely because he was a Negro, so also a Negro's § 1 right to "make and enforce contracts" is violated if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees.

Id. at 170-71. *See also General Building Contractors Association, Inc.* v. *Pennsylvania*, 458 U.S. 375, 388 (1982) (requiring proof of discriminatory intent under Section 1981, the Court noted that the evils addressed by the 39th Congress did not include neutral practices "that had the incidental effect of disadvantaging blacks to a greater degree than whites").

In its Brief, the Congregation argues that this Court's decision in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), supports the misperception standard. (Brief for the Petitioners, 17).[14] In fact, the latter holding is aimed at achieving the statute's objective of racial equality and supports the standard urged by the defendants. In *Sullivan*, this Court held that whites have standing to sue to "vindicate the rights of minorities protected by § 1982." *Sullivan*, 396 U.S. at 237. In so holding, the Court continued to focus on eradicating discrimination against persons because of their race. It simply permitted persons other than the minority victims of that discrimination to challenge it in federal court.

As noted above, this Court has not provided the lower federal courts with a comprehensive definition of race discrimination under Sections 1981 and 1982. Consequently, some of those courts have experienced difficulties in grappling with situations where race discrimination and national origin discrimination argua-

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[14] The plaintiffs also argue that this Court's decision in *Tillman* v. *Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973), supports application of their misperception standard. (Brief for the Petitioners, 17-18). In *Tillman*, the Court remanded to the district court the issue whether the white plaintiffs successfully could challenge the adoption of a guest policy that excluded their black guests. *Id.* at 440. Because of the posture of the case, the Court's decision in *Tillman* adds nothing to the *Sullivan* holding.

bly are present at the same time. However, in attempting to delineate the coverage of the civil rights acts, no federal appellate court ever has focused on a defendant's erroneous perceptions of racial identity in evaluating the viability of claims under those statutes. Instead, referring to the explicit statutory language, the courts have focused on the plaintiff's physical appearance or skin color.

In *Al-Khazraji* v. *Saint Francis College*, 784 F.2d 505 (3d Cir. 1986), *cert. granted*, 107 S.Ct. 62 (1986), the Third Circuit held that an Arab plaintiff's Section 1981 claim that he had been denied tenure because of "national origin, religion and/or race," *id.* at 508, n. 4, could survive a motion for summary judgment. The court did not hold that a Section 1981 claim can be based on national origin or religious discrimination. Instead, it emphasized the plaintiff's racial characteristics.

Like this court in *McDonald*, the Third Circuit reviewed the legislative history of the Civil Rights Act of 1866 and noted that it was enacted to protect persons of "every race and color" from discrimination. *Id.* at 515. In grappling with the sometimes ethereal distinction between race and national origin, the court stated:

> We believe that Congress's purpose was to ensure that all persons be treated equally, without regard to color or race, which we understand to embrace, at the least, membership in a group that is ethnically and physiognomically distinctive.
>
> . . . .
>
> While the distinction between racial discrimination, which is cognizable under Section 1981, and other types of discrimination, which may not be cognizable, may in some instances be obscure, that cannot justify refusing to attempt the distinction.

> Discrimination based on race seems, at a minimum, to involve discrimination directed against an individual because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of *homo sapiens*.

Id. at 517 (footnote omitted). Clearly, the Third Circuit did not base its determination of the coverage of Section 1981 on the subjective perceptions of the individual defendants, the standard urged by the Congregation herein. In fact, the court requires the very showing of ethnic and physiognomical distinctions to establish Section 1981 coverage which the Congregation criticizes.

In *Alizadeh* v. *Safeway Stores, Inc.*, 802 F.2d 111 (5th Cir. 1986), the Fifth Circuit held that the plaintiff could state a claim under Section 1981 for discrimination directed toward her Iranian husband. Like the Third Circuit in *Al-Khazraji*, the court focused on the physical traits of the plaintiff's husband:

> Mrs. Alizadeh's husband was allegedly considered by the defendant to be of a "race other than white," and we cannot say that he is any less ethnically and physiognomically distinctive, as compared to a "white," than was the Iraqi in *Al-Khazraji*.

Id. at 115. *See also Manzanares* v. *Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979) (Mexican-American was permitted to sue under Section 1981 because Mexican-Americans as a group allegedly are treated differently than other "white citizens").[15]

[15] The plaintiffs attempted to rely on the *Manzanares* case in the Fourth Circuit. Without deciding whether that case was correct, Judge Hall distinguished it. It was in the context of distinguishing *Manzanares* that Judge Hall noted that the position of Jews in this society is not analogous to that of Mexican-Americans. (Pet. A. 7a and Brief for the Petitioners, 10). The latter statement was not necessary, or even important, to the Fourth Circuit's ultimate holding that Section 1982's coverage cannot be based only on the subjective, irrational perceptions of defendants.

Neither this Court nor the federal appellate courts have accepted the Congregation's misperception theory for Section 1982 coverage. No court has indicated that the statute covers the desecration of a synagogue simply because the defendants were motivated by the false perception that Jews are members of a different race. In fact, acceptance of the Congregation's theory for Section 1982 liability may well conflict with this Court's prior decision indicating that Section 1982 does not encompass religious discrimination. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968). By arguing that the defendants' irrational, racial perceptions may form the basis for a Section 1982 action, the Congregation is attempting to find a back door for coverage of claims of religious discrimination. Under the Congregation's theory, any plaintiff, whether Jewish, Catholic, Mormon, or any other creed, would be able to state a claim under Section 1982 simply by alleging that the defendant who wronged him was motivated by an ill-conceived racial animus. Such a broad expansion of the coverage of Section 1982 never has been condoned by this Court.

The Congregation's misperception theory pushes Section 1982's coverage far beyond the statute's language, as interpreted by its draftsmen and by this Court. Section 1982 was intended to protect individuals from discrimination based on their race in order to guarantee racial equality. To borrow this Court's own words in interpreting Section 1981 in another context, "[t]o infer that Congress sought to accomplish more than this would require stronger evidence in the legislative record than we have been able to discern." *General Building Contractors Association, Inc.* v. *Pennsylvania*, 458 U.S. 375, 388 (1982). Since the requisite evidence in the legislative record is not present in this case, the Fourth Circuit cor-

rectly refused to extend Section 1982's protection as urged by the Congregation.

B. Congress And This Court Previously Have Approved The Use Of The Type Of Racial Classifications Which Are Necessary To Determine The Scope Of The Protection Afforded By Section 1982.

Despite the obvious thrust of Section 1982's language and legislative history, the Congregation argues that its misperception standard should be adopted by this Court because it is both inappropriate and impracticable to engage in racial classification. (Brief for the Petitioners, 24-30). The Congregation's argument has little credibility in light of the many areas of modern discrimination law in which racial classifications are required by Congress, federal administrative agencies and this Court in an effort to achieve racial equality.

Perhaps the most visible example of modern permissible racial classification can be found in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 (1982). Among other things, Title VII prohibits a refusal to hire "any individual" because of "such individual's race." 42 U.S.C. § 2000e-2(a)(1) (1982).[16] According to this Court, a *prima facie* case of disparate treatment can be established by a plaintiff in a Title VII hiring case by showing:

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[16] Section 703 of Title VII, 42 U.S.C. § 2000e-2 (1982), provides, in pertinent part:

> (a) It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

> (i) *that he belongs to a racial minority;* (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792, 802 (1973) (emphasis added).

Similarly, in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), this Court held that "[i]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431. By definition, a plaintiff in such a disparate impact case must make racial distinctions in order to show that a particular employment practice has a greater adverse impact on one racial group than on another.

Clearly, in order to prove race discrimination under Title VII, a plaintiff must be able to show that he is racially distinct, the very showing that the Congregation contends is unseemly and impracticable under Section 1982. Furthermore, the fact that Title VII is regarded as the modern analog of Section 1981 supports the existence of a similar requirement under the older civil rights statutes. Indeed, this Court has indicated that "[a]lthough the exact applicability of . . . [Section 1981] has not been decided by this Court, it seems clear that it affords no greater substantive protection than Title VII." *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 583, n. 24 (1979).[17] The Congregation's argument for a mispercep-

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[17] The lower federal courts typically use the Title VII disparate treatment test in employment discrimination cases under Section 1981. *Person* v. *J.S. Alberici Construction Co.*, 640 F.2d 916, 918-19 (8th Cir. 1981); *Hudson* v. *International Business Machines Corp.*,

tion standard ignores the above statement by this Court and extends the coverage of Sections 1981 and 1982 far beyond that available under Title VII.

The invalidity of the Congregation's argument that race cannot be defined for purposes of determining Section 1982's coverage is illustrated further by the recordkeeping requirements imposed on employers by the Equal Employment Opportunity Commission (the "EEOC"). Pursuant to Title VII, the EEOC requires employers with 100 or more employees to file annual employer information reports, called EEO-1's. 29 CFR § 1602.7 (1986). In the EEO-1's, employers must provide a breakdown of their workforce by race in selected job categories. Essentially, the employers are required to categorize their workforce either as White, Black, Hispanic, Asian or Pacific Islander, or American Indian or Alaskan Native.

Other areas of federal law also require reference to racial distinctions. Title VIII of the Civil Rights Act of 1968 prohibits discrimination in the sale or rental of housing "to any person because of race, color, religion, sex, or national origin." 42 U.S.C. § 3604(a) (1982). The Voting Rights Act of 1965 prohibits the imposition of voting qualifications which deny "the right of any citizen . . . to vote on account of race or color." 42 U.S.C. § 1973 (1982). Challenges to race discrimination under the Fourteenth Amendment's equal protection clause require reference to the parties' racial identities in determining whether a violation has occurred. *See Washington* v. *Davis*, 426 U.S. 229 (1976). The racial animus requirement under 42

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620 F.2d 351, 354 (2d Cir.), *cert. denied*, 449 U.S. 1066 (1980); *Crawford* v. *Western Electric Co.*, 614 F.2d 1300, 1315 (5th Cir. 1980). As noted previously, in order to apply the disparate treatment test, racial distinctions must be drawn.

U.S.C. § 1985(3), the civil rights statute prohibiting conspiracies denying equal protection of the laws and equal privileges and immunities under the laws, is established by reference to racial classifications. *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971). Finally, this Court has approved the use of racial classifications in affirmative action remedies in certain circumstances. *Local No. 93, International Ass'n of Firefighters* v. *Cleveland*, 106 S. Ct. 3063 (1986); *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984); *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979); *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978).

The Congregation's argument that the Fourth Circuit's standard is unworkable because race cannot be defined pales in light of the numerous instances in which race must be defined under federal law. The Fourth Circuit rejected the Congregation's misperception argument and held that both racial distinctiveness and intent are elements of a Section 1982 claim. Its holding was perfectly consonant with the statute's objective of achieving racial equality—an objective which is shared by the Thirteenth and Fourteenth Amendments, by the civil rights statutes described above, and by affirmative action remedies. Clearly, racial determinations are possible when necessary to achieve statutory and constitutional purposes.

C. Not Only Is The Congregation's Suggested Construction Of Section 1982's Coverage Unworkable, But, By Infinitely Expanding The Scope Of The Civil Rights Laws, It Will Lead To Unwarranted Consequences In The Lower Federal And State Courts.

The plaintiffs' suggested standard may have some surface appeal, especially in light of the deplorable events alleged in the complaint. However, in addition to ignoring the absence of legal support for its standard, the Con-

gregation has not addressed the practical difficulties of extending Section 1982 to any person who alleges that a defendant irrationally perceived him as racially distinct. The lower courts are not better equipped to evaluate when an act is racially motivated than to evaluate when the plaintiff (or the person whose rights he seeks to vindicate) is racially distinct.

Under the Congregation's theory, Section 1982 would cover all violations of the property rights enumerated therein which are motivated by racial prejudice. Without some sort of objective race standard, how will the courts evaluate when an act is motivated by racial prejudice? The Congregation makes no attempt to explain how its standard should be applied by the courts but simply asserts that, in this case, it has been conceded that the defendants acted out of a racial motivation. In that vein, it also has been conceded in this case that Jews are not racially distinct. Accordingly, application of a standard which requires the showing of racial distinctions also is not difficult in this case.

The serious difficulties inherent in applying the misperception standard are illustrated by the *amicus curiae* brief filed on behalf of the Anti-Defamation League of B'nai B'rith (the "ADL") and others. The ADL notes that "[t]here are numerous factors—none of which is exclusive—that the courts should consider in determining whether a plaintiff has adequately pleaded and can plausibly assert that he was the victim of *racial* discrimination." (Brief of the ADL, *et al.*, 21) (emphasis in original). The ADL then offers the following suggestions regarding what factors the courts should consider in deciding whether the requisite intent is present:

> The factors to be considered should include the plaintiff's allegations concerning the racial or racist

> motivations of the defendant. In addition, the court should weigh the plaintiff's allegations regarding his own race or skin color. Equally important factors are the extent to which the plaintiff belongs to an identifiable group that is commonly or historically regarded by bigots or lay persons as constituting a "race," as the term is understood in a broad sense. Unless the plaintiff's allegations are inconsistent with the notion that he or she has suffered discrimination that is racial or racist in character, a cause of action has been stated and the plaintiff should be entitled to prove his or her claim.

(Brief of the ADL, 21). *See also* Brief of the ADL, 9, n. 3. Even under the misperception standard, "race or skin color" is a criterion to be considered. The ADL's final suggestion that the plaintiffs should be permitted to prove their case, provided that their allegations are not inconsistent with the notion that they have suffered race discrimination, is of no help to a trial court faced with pleading and proof issues. Such an approach undoubtedly would lead to intolerably different results from one court to another. Most importantly, there is absolutely no indication that the draftsmen of the Civil Rights Act of 1866 intended such a flexible, fact-based standard.

If the Congregation's theory for expanded Section 1982 coverage is adopted, then anyone could state a claim under the statute for actions based on an ill-founded racial determination. As noted by Judge Murnaghan in his concurring opinion in the Fourth Circuit, the Congregation's legal theory would lead to myriad, federal civil rights suits arising out of various defendants' misperceived notions of the racial identity of others. Such suits should not be permitted absent a clear Congressional intent to cover wrongdoing arising out of a misperception of the race of the victim.

By seeking to expand Section 1982 to cover such suits, the Congregation is making a legislative argument. It is asking this Court to judicially legislate a new federal cause of action. In support of its argument for a new federal cause of action, the Congregation argues that state remedies are inadequate and only a federal civil rights remedy will suffice.

The Congregation contends that state criminal and common law remedies are unacceptable because they ignore the deplorable motivation for the defendants' acts. Such is not the case. The injury to individual dignity resulting from the alleged anti-Semitic acts certainly would be considered by a criminal judge in sentencing the wrongdoers and awarding criminal restitution.[18] Likewise, the egregious nature of the alleged acts would be central in the minds of a jury deciding what amount of punitive damages to award for state tort law violations. Such punitive damages are available for all of the pendent state tort claims alleged in the Congregation's complaint. *Bender* v. *Bender*, 57 Md. App. 593, 471 A.2d 335, *cert. denied*, 300 Md. 152, 476 A.2d 721 (1984) (punitive damages may be awarded in trespass cases); *Gorman* v. *Sabo*, 210 Md. 155, 122 A.2d 475 (1956) (punitive damages may be recovered in a private nuisance case); *Moniodis* v. *Cook*, 64 Md. App. 1, 494 A.2d 212, *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985) (punitive damages are available for intentional infliction of emotional distress).

In the final analysis, the adequacy of state law remedies has no bearing on the coverage of Section 1982. This

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[18] In Maryland, judges are free to, and often do, award criminal restitution to the victims of crime. In fact, criminal restitution is available under Maryland law for the very crime of which the defendants herein are accused, malicious destruction of property. Md. Ann. Code art. 27, § 640(b) (1985).

Court's interpretation of that federal statute cannot depend on whether remedies are available under Maryland law or under any other state's law. Rather, its interpretation must be based on the statute's language and legislative history, keeping in mind the legislature's purpose of achieving racial equality. There simply is no evidence that Section 1982 was intended to cover the desecration of a synagogue by defendants, even when those defendants arguably were motivated by an erroneous racial animus. Under the circumstances, the Congregation must look to the Congress and to the state legislatures if it wishes to secure a statutory civil rights remedy for the wrongful conduct alleged in its complaint.

CONCLUSION

For all of the foregoing reasons, respondent Michael David Remer requests that this Court affirm the decision of the United States Court of Appeals for the Fourth Circuit and hold that the federal courts' jurisdiction over claims under 42 U.S.C. § 1982 cannot be based solely on the irrational, racial misperceptions of defendants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

v.

JOHN WILLIAM COBB, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2156

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

v.

JOHN WILLIAM COBB, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR THE PETITIONERS

ARGUMENT

NEITHER THIS COURT'S OPINIONS, THE LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT, NOR LAWS PROHIBITING RACIAL DISCRIMINATION IN OTHER CONTEXTS SUPPORT RESPONDENT'S ARGUMENT THAT PROOF OF A PLAINTIFF'S "RACE" IS A PREREQUISITE TO COVERAGE UNDER § 1982.

The critical error of respondent's argument, and of the Fourth Circuit majority, is its attempt to draw a distinction between race and the perception of race. The Fourth Circuit held the statute inapplicable where "a plaintiff is not a member of a racially distinct

group but is merely *perceived* to be so by defendants" (Pet. App. 6a (emphasis in original)). This statement assumes that racial differences are something that really exist in the world, that one could see, touch, and feel, rather than something merely perceived, *i.e.*, based on a definition created in the mind and described in language.[1] Respondent's argument should be rejected, and the Fourth Circuit's holding reversed, because the coverage of the 1866 Civil Rights Act is not dependent on some artificial definition of "race." The statute, instead, should be applied to all acts of racism, a construction that plainly accords with the language of the Act, its legislative history, and this Court's prior decisions. The admitted facts of this case show that it is a case of racism, and it accordingly should be covered.

A. This Court's Decisions Construing the Civil Rights Act of 1866 and the Legislative History of the Act Confirm that Its Protections Apply to Acts of Racial Discrimination and Do Not Require a Plaintiff to Prove that He or She Is "Racially Distinct."

Respondent attempts to denigrate petitioners' claim of racially motivated discrimination by dubbing it a "misperception theory." Respondent admits that he acted out of a belief that Jews are racially distinct

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[1] "To most people, a race is any group of people whom they choose to describe as a race." UNESCO, Statement on Race (1950). *Accord* S. Molnar, *Human Variation: Races, Types, and Ethnic Groups* 17 (2d ed. 1983) ("[j]ust what constitutes a race is a hard question to answer, because one's classification usually depends on the purpose of classification, and various approaches to taxonomy often have a built-in bias, especially when applied to humans").

and inferior,[2] but argues that his conduct is not actionable under § 1982 because his views about Jews were false. While the petitioners do not share respondent's completely erroneous view that they are racially distinct and inferior, petitioners reject the notion that the Civil Rights Act distinguishes between "true" and "false" racist doctrine and only covers acts of racism directed at members of "truly distinct" racial groups.

In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968), this Court made explicit that "§ 1 [of the Civil Rights Act of 1866] was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute * * * " (emphasis in original).[3] The words

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[2] Respondent cannot hide behind a claim that the desecration was an act of religious discrimination. The Nazi and Ku Klux Klan symbols used by respondents make all too clear that it was racism, not religious zeal, that caused respondents to act. Moreover, respondents have admitted that they were motivated by racism. *See* Brief for Appellees, No. 85-1544 (4th Cir. filed Sept. 11, 1985) ("for purposes of this appeal, the defendants do not take issue with the plaintiffs' factual argument that defendants perceived Jews as racially inferior").

[3] Respondent argues that the force of this statement is somehow diminished by the fact that the Court held in *Jones* that private as well as public acts of racial discrimination are prohibited by § 1982. Brief for Respondent Remer at 20. The fact that the Court discussed racial motivation in the context of that holding means only that racially motivated deprivations of rights enumerated in the statute by public or private actors are equally actionable. It is difficult to understand what comfort respondent hopes to derive from the holding in *Jones*, since he is a private actor covered by that holding.

Respondent also criticizes petitioners' use of *Jones* as "misleading" because in their opening brief they did not quote the

"racially motivated" in this quotation were not used thoughtlessly by the Court, as respondent seems to suggest; the opinion stressed in other contexts as well that it was *racial discrimination* that the 1866 Act was intended to eradicate.[4] This Court followed the same rationale in holding, *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), that the statute protects whites who suffer racially motivated interference with rights protected by the Act. The Court reasoned that it is not the race of the victim that determines coverage but the existence of racial discrimination, a term used repeatedly in the opinion.[5]

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entire sentence, which goes on to state: "* * * although only those deprivations perpetrated 'under color of law' were to be criminally punishable under § 2." Brief for Respondent Remer at 20 n.12, quoting *Jones*, 392 U.S. at 426. The unquoted part of the sentence, dealing with criminal penalties under § 2 of the Act, does not in any way detract from the Court's point that "*all* racially motivated deprivations of the rights enumerated in the statute" were intended to be covered.

[4] *E.g.*, 392 U.S. at 434 ("[t]o Congressman Cook and others like him, it seemed evident that, with respect to basic civil rights—including the 'right to * * * purchase, lease, sell, hold, and convey * * * property,' Congress must provide that 'there * * * be *no* discrimination' on grounds of race or color (footnote omitted) (emphasis in original)); *id.* at 434 ("[w]hen the House passed the Civil Rights Act * * * it did so on the same assumption that had prevailed in the Senate: It too believed that it was approving a comprehensive statute forbidding *all* racial discrimination affecting the basic civil rights enumerated in the Act" (emphasis in original)).

[5] *E.g.*, 427 U.S. at 276 ("we must decide whether § 1981 * * * affords protection from racial discrimination in private employment to white persons as well as nonwhites"); *id.* at 287 ("we cannot accept the view that the terms of § 1981 exclude its application to racial discrimination against white persons"); *id.* at 288 ("the terms of the bill prohibited any racial discrimination

In *General Building Contractors Association* v. *Pennsylvania*, 458 U.S. 375 (1982), this Court reinforced its statements in *Jones* that racially motivated deprivations of protected rights trigger the coverage of the Civil Rights Act. In *General Building Contractors*, the Court held that § 1981 "can be violated only by purposeful discrimination" and does not protect against acts that are racially neutral in motivation but that have a disparate impact.[6] In support of its holding, the opinion for the Court underscored the words "racially motivated" in the *Jones* Court's statement that "§ 1 of the 1866 Act 'was meant to prohibit *all racially motivated* deprivations of the rights enumerated in the statute.' "[7]

All of these holdings are thoroughly grounded in the language and legislative history of the 1866 Act. By its terms, § 1982 protects "all citizens." Congress did not limit the Act's protection to some particular group of races, but cast it in terms that would assure that "the very object and effect of the section is to prevent discrimination."[8]

The argument advanced by respondent in this Court assumes that a defendant's conduct cannot be racially motivated unless the plaintiff proves that he or she

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in the making and enforcement of contracts against whites as well as nonwhites").

[6] 458 U.S. at 391.

[7] 458 U.S. at 388 (emphasis in original), quoting *Jones*, 392 U.S. at 426.

[8] Cong. Globe, 39th Cong., 1st Sess. 1758 (1866) (remarks of Sen. Trumbull, author of the 1866 Act). *See generally* Brief for Petitioners at 19-23, regarding the legislative history of the 1866 Act.

is a member of a "distinct race."[9] The fundamental defect in that argument is revealed by respondents'

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[9] The holdings in *Al-Khazraji* v. *Saint Francis College*, 784 F.2d 505 (3d Cir.), *cert. granted*, 107 S. Ct. 62 (1986) and *Alizadeh* v. *Safeway Stores, Inc.*, 802 F.2d 111 (5th Cir. 1986) do not support respondent's theory. In *Al-Khazraji*, the plaintiff alleged discrimination on the basis of his Arab ancestry. The Third Circuit recognized that the plaintiff was "taxonomically classified as a member of the Caucasian race," 784 F.2d at 515, but cited *McDonald* for the proposition that whites "who have been victims of racial discrimination can sue under Section 1981." *Id.* The court held that plaintiff stated a claim because the discrimination alleged was "the sort of discrimination proscribed by Section 1981." *Id.* (footnote omitted). The Third Circuit observed that "Congress's purpose was to ensure that all persons be treated equally, without regard to color or race, which we understand to embrace, at the least, membership in a group that is ethnically or physiognomically distinctive." *Id.* at 517 (footnote omitted). In some cases, as the Third Circuit suggests, evidence that discrimination is racial could be provided by demonstrating that the plaintiff's color renders him or her vulnerable to racial discrimination. The Third Circuit did not suggest that as the exclusive test, nor should it be. Where, as here, racial motivation is admitted and is clear from the Nazi and Ku Klux Klan character of the discrimination, there should be no question under the *Al-Khazraji* court's analysis that petitioners are protected.

The same is true of *Alizadeh* v. *Safeway Stores, Inc.* The plaintiff in *Alizadeh* is white, and claimed protection against racial discrimination under § 1981 because her husband, an Iranian, was considered by defendants "as a member of a race other than White." 802 F.2d at 113. The court in *Alizadeh* defined the issue as "whether a woman who is married to an Iranian and who has been discriminated against because her husband is considered by a prejudiced person to be nonwhite is entitled to the protection of § 1981." *Id.* at 114. The court recognized that "[a]nthropologists classify Iranians as Caucasians" but held that "we do not think that a taxonomical definition of race is in keeping with the rationale of *McDonald*."

own conduct—an attack on plaintiffs that was admittedly motivated by the Nazi and KKK ideology that Jews are racially distinct and inferior. The argument that victims of such racial discrimination should be denied the remedies provided by a statute prohibiting racial discrimination should be rejected, because (1) this Court should not close its eyes to the reality of the racial discrimination before it, and (2) the federal courts should not take on the odious function of determining the race of plaintiffs in civil rights cases.

Respondent's argument focuses on the words "race" and "color" in this Court's opinions and in the legislative history as the basis for his argument that a plaintiff must prove his race or color. But this Court has never required that proof. On the contrary, it has regarded purposeful discrimination—the intent of the discriminator—as the touchstone of coverage. *General Building Contractors*. That is why, for example, in *Tillman* v. *Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973)[10] and *Sullivan* v. *Little Hunting*

Id. at 114-15. The Court relied on *Al-Khazraji* in holding that *Alizadeh* stated a claim. *Accord Jatoi* v. *Hurst-Euless-Bedford Hosp. Auth.*, 807 F.2d 1214 (5th Cir. 1987) (in holding that East Indian stated a § 1981 claim, citing *Alizadeh* for the proposition that the circuit has refused to limit the protection of § 1981 to taxonomically defined racial groups).

[10] Respondent attempts to minimize the significance of *Tillman* by arguing that this "Court remanded to the district court the issue whether the white plaintiffs successfully could challenge the adoption of a guest policy that excluded their black guests," Brief for Respondent Remer at 23 n.14, as if this Court had some doubt that the white plaintiffs could state a claim. In fact, the Court expressed no such doubt. The district court was directed on remand to develop the facts and "evaluate the claims

Park, Inc., 396 U.S. 229 (1969), the Court held that the Act applies to whites who suffer from racism because of their advocacy of the rights of blacks.[11] Eradication of racial discrimination and its effects would not be well served by permitting respondents, who admit their racist notions about Jews, to escape the application of federal law because their racist views are so completely wrong.

B. The Other Protections Against Discrimination Cited by Respondent Do Not Support His Claim that Federal Law Establishes Racial Categories that Can Be Imposed on § 1982.

To succeed in stating a § 1982 claim under respondent's test, a plaintiff would have to allege membership in a "racially distinct" group that has somehow been predetermined to be a "racial group" protected by the statute. Respondent does not offer a list of protected races, but only suggests that com-

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of the parties free of the misconception that Wheaton-Haven is exempt from §§ 1981, 1982, and 2000a." 410 U.S. at 440 (footnote omitted). On remand, the Tillmans prevailed and were awarded damages for the injuries they suffered when their black guests were denied admission by Wheaton-Haven. *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 367 F. Supp. 860 (D. Md. 1973).

[11] Respondent undercuts his own argument that it is the supposed actual racial classification of a plaintiff that determines the coverage of § 1982 by suggesting that petitioners could strengthen their claim under § 1982 if they alleged that Jews are a racial group. Brief for Respondent Remer at 5. Jews are not a racial group, and it would make no sense to hold that they could claim coverage under § 1982 if they were willing to make allegations contrary to fact. The racial prejudice against Jews and the indignities they suffer would only be intensified by requiring them and other groups to allege and prove "racial distinctness" in order to obtain the protection of federal law.

pilation of such a list would be easy because federal courts and agencies supposedly have done it in other contexts. *See* Brief for Respondent Remer at 27-30. In fact, the racial categories described by the United States government for different purposes vary considerably, have changed over time, and shed no light on the proper coverage of the Civil Rights Acts. The sources cited by respondent are excellent examples of why judicial legislation of a list of protected races is not only repugnant but unworkable.

Respondent claims that Title VII of the Civil Rights Acts of 1964, 42 U.S.C. § 2000e-2000e-17 (1982), which protects against discrimination in employment based on national origin, religion, color, and gender as well as race, is a "visible example of modern permissible racial classification." Brief for Respondent at 27. Respondent has not cited a single case, however, in which the Equal Employment Opportunity Commission ("EEOC") or a court has presumed to resolve a factual dispute concerning a plaintiff's race in determining that plaintiff's entitlement to protection under Title VII.[12]

Moreover, contrary to respondent's claims, even in disparate impact cases, the courts have not focused on proof of the race or other group membership of a plaintiff. It is simply not the case, as respondent claims, that proof of membership in "a racial minority" is a prerequisite for Title VII coverage where a plaintiff alleges racial discrimination. *See* Brief for

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[12] The EEOC has promulgated no regulations that require a plaintiff to prove his or her "race," define that term, or specify how a claimant would prove "race."

Respondent Remer at 28.[13] Instead, the courts have looked at the discriminatory intent of the defendants to determine coverage.[14] In fact, in cases in which discriminatory intent has been absent because defendant did not know about the group membership of plaintiff that allegedly gave rise to disparate treatment, Title VII protection has been denied.[15]

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[13] Respondent cites the discussion in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), for the proposition that proof of membership in "a racial minority" is the first prong of a four-part test required to establish a Title VII claim. Respondent neglects to explain, however, that the Court introduced that discussion by saying a complainant "may" establish a prime facie case by showing those elements. *Id.* Since *McDonnell Douglas*, this Court has made abundantly clear that the elements of a prima facie case described there were not exclusive. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 358 (1977) (footnote omitted).

[14] *See Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 253-56 (1981); *Earnhardt* v. *Puerto Rico*, 582 F. Supp. 25, 27 (D.P.R. 1983) *aff'd*, 744 F.2d 1 (1st Cir. 1984) (claimant met his burden of proof under Title VII by showing "that he was the only member of a group * * * classified as distinct and different by the other employees and supervisors"). In disparate treatment cases as well the lower courts have focused on the defendant's discriminatory intent, and not on the plaintiff's membership in a "protected group" to determine the coverage of the statute. *See Clark* v. *Atchison, Topeka & Santa Fe Railway Co.*, 731 F.2d 698, 702 (10th Cir. 1984); *Smith* v. *Honeywell, Inc.*, 735 F.2d 1067, 1068-69 (8th Cir.), *cert. denied*, 469 U.S. 1077 (1984).

[15] For example, in *Nieves* v. *Metropolitan Dade County*, 598 F. Supp. 955 (S.D. Fla. 1984), the plaintiff stated on his employment application form that he was Caucasian but claimed in his Title VII allegation that he was Hispanic, and was not promoted for that reason. The court made no effort to determine whether the plaintiff was Caucasian or Hispanic, but instead

As respondent points out, the EEOC now requires employers "to categorize their workforce either as White, Black, Hispanic, Asian or Pacific Islander, or American Indian or Alaskan Native," Brief for Respondent Remer at 29, but the EEOC does not proffer these categories as determinative of the coverage of the statute. In fact, in 1977, the EEOC reclassified natives of India from the "White" category to the "Asian or Pacific Islander" category.[16] The reclassification was not based on any change in the natives of India, but on ease of federal record-keeping.[17]

The fact that the federal government uses different categories for purposes other than Title VII further undermines respondent's claim that such categories can readily be used to define the coverage of § 1982. For example, for census purposes the federal gov-

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rejected plaintiff's claim for lack of discriminatory intent because "it is difficult to see how [the defendant] could have discriminated against [the plaintiff] on [the basis that plaintiff is Hispanic] if he was never made aware of the fact." 598 F.2d at 962. *Accord EEOC* v. *Circus World, Inc.*, No. 85-648-CIV-ORL-18 (Dec. 4, 1986) (Title VII claim of discrimination based on plaintiff's pregnancy dismissed at end of plaintiff's case for lack of proof that employer knew plaintiff was pregnant when he decided to discharge her).

[16] EEOC, *Government-Wide Standard Race/Ethnic Categories*, 42 Fed. Reg. 17,900 (1977).

[17] The categories used by the federal government for immigration purposes have changed dramatically over the decades. *See* Appendices A and B to Brief for Respondent in *Saint Francis College* v. *Al-Khazraji*, No. 85-2169 (filed Jan. 23, 1987). These appendices catalogue "racial classifications" utilized by the Bureau of Immigration and Naturalization from 1899 until the 1930s and the Racial Tables in Annual Reports of the Commissioner General of Immigration from 1900 to 1932.

ernment uses a different set of categories of "race": White, Black, American Indian, Eskimo, Aleut, Japanese, Chinese, Filipino, Korean, Asian Indian, Vietnamese, Hawaiian, Guamanian, Samoan, and "Other."[18] For purposes of administering the Local Public Works Capital Development and Investment Act, "minority group members" are defined as citizens of the United States who are "Negro, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut."[19]

The other statutory and judicial protections mentioned by respondent are no more persuasive in support of his theory that racial definitions are widely recognized in federal law. Respondent argues that what he calls "[t]he racial animus requirement under 42 U.S.C. § 1985(3), the civil rights statute prohibiting conspiracies denying equal protection of the laws and equal privileges and immunities under the laws, is established by reference to racial classification. *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971)." Brief for Respondent Remer at 29-30. However, in *Griffin* and in *United Brotherhood of Carpenters and Joiners, Local 610* v. *Scott*, 463 U.S. 825 (1983), the Court's more recent discussion of § 1985(3), the Court repeatedly described the coverage of the statute in terms of animus or motivation, and not in terms of particular racial or other groups it protects.[20] This Court re-

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[18] U.S. Department of Commerce, Bureau of the Census, *1980 General Population Characteristics United States Summary*, Table 38 (1983).

[19] 13 C.F.R. § 317.2 (1986).

[20] *E.g.*: "Although we have examined with some care the legislative history that has been marshalled in support of the position that Congress meant to forbid wholly non-racial, but

cently relied on *Griffin*'s requirement of "invidiously discriminatory animus behind the conspirators' action," 403 U.S. at 102, to support its holding in *General Building Contractors* that such intent is required under the successors to the 1866 Civil Rights Act. *General Building Contractors*, 458 U.S. at 390 n.17.

This Court's cases under the Fourteenth Amendment also fail to support respondent's argument that proof of membership in a "race" is a prerequisite of a claim. It is ironic that respondent relies on *Washington* v. *Davis*, 426 U.S. 229 (1976) for the proposition that "[c]hallenges to race discrimination under the Fourteenth Amendment's equal protection clause require reference to the parties' racial identities in determining whether a violation has occurred." Brief for Respondent Remer at 29. During the last decade, beginning with *Washington* v. *Davis*, the Court has focused increasing emphasis on discriminatory intent as the *sine qua non* of equal protection analysis under the Fifth and Fourteenth Amendments.[21] This Court

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politically motivated conspiracies * * * ." *Scott*, 463 U.S. at 836; "We thus cannot construe § 1985(3) to reach conspiracies motivated by economic or commercial animus." *Id.* at 838; "The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment." *Griffin*, 403 U.S. at 102; "We need not decide * * * whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us." *Id.* at n.9.

[21] *See Memphis* v. *Greene*, 451 U.S. 100, 119 (1981); *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 464 (1979); *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 260, 274 (1979).

has not defined "race" under the Fifth and Fourteenth Amendments and there is no need for it to do so because its analysis focuses, as it should here, on discriminatory intent regardless of the actual race of its target.[22]

Respondent's citations to these other sources of protection against discrimination fail to support his claim that definitions of race are prevalent under federal law. Moreover, they suggest the potential pernicious effects of a holding here that some proof of a plaintiff's racial group must be established as a prerequisite to § 1982 coverage. Such a holding would be an open invitation to defendants in cases brought under these other statutes and constitutional provisions to challenge the race of the plaintiff. In our pluralistic society, such challenges inevitably would degenerate into efforts to determine, for example, how many black grandparents a black plaintiff must have in order to sustain a race discrimination claim. Such sideshows would involve the federal judiciary in

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[22] The same is true of the Voting Rights Act and Title VIII. The Voting Rights Act protects against discrimination based on linguistic characteristics as well as race and color. 42 U.S.C. §§ 1973, 1973b(f)(2). Title VIII of the Civil Rights Act protects against discrimination in the sale or rental of housing "to any person because of race, color, religion, sex, or national origin." 42 U.S.C. § 3604(a)(1982). Respondent cites no cases supporting the notion that the "race" or "color" of plaintiffs is tested by the courts under these acts, because the courts simply have not done so. The affirmative action cases cited by respondent at page 30 of his Brief do not support his theory either. Although this Court has approved the use of racial classifications in remedies in some circumstances, it certainly has not defined the races involved or constructed tests to determine how individuals can be categorized by race.

the wholly inappropriate task of defining race, and do nothing to stem discrimination.

C. Coverage of Petitioners' Claim Under § 1982 Will Make Clear that the Protection of Federal Law Is as Extensive as Racially Based Violations of the Rights Protected by the Statute.

Respondent argues that the Congregation's construction of § 1982 will "infinitely expand[ ] the scope of the civil rights laws." Brief for Respondent Remer at 30. That is not the case. Petitioners do not contend that all acts of discrimination, regardless of their character and motivation, should be covered by § 1982. In accordance with this Court's precedents, coverage applies only to racially motivated conduct.

Proof of racial motivation does not require reference to some "objective race standard," as respondent claims. Brief for Respondent Remer at 31. As demonstrated in the opening Brief for Petitioners at 24-30, anthropologists increasingly reject the notion that there are such categories. The task of sorting out racial motivations from other motivations is no different from assessing intent in other contexts, which finders of fact do routinely and in many instances with severe consequences. A finder of fact must always look at factors such as admissions and statements, the surrounding circumstances, and the historical context to determine what motivated an actor.[23] Respondent criticizes use of such factors be-

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[23] The *amici* brief filed by the Anti-Defamation League of B'nai B'rith and others (the "ADL") articulates factors that could be used by the lower federal courts:

> There are numerous factors—none of which is exclusive—that the courts should consider in determining whether a

cause they may include consideration of a plaintiff's own allegations of his race or color. This is a far cry from asking a court to determine the race or color of a plaintiff. Certainly a black plaintiff should be able to allege that he is black and that the discrimination against him was racial. In some cases, the conduct itself makes clear the racial motivation. A cross burning, emblematic of the Ku Klux Klan, is unmistakable as a racist act. An assault on the street of a black by a white also carries a racist implication if, for example, it was preceded by racial epithets or a history of such harassment. A finder of fact can be trusted to weigh the difference between that and a mugging motivated by a desire for money.

It is more in keeping with the proper role of the federal courts for finders of fact to weigh the intent of defendants than to determine the race of plaintiffs. There is simply no reason to believe that this approach to construction of § 1982, which was urged

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plaintiff has adequately pleaded and can plausibly assert that he was the victim of *racial* discrimination, as opposed to discrimination on some other basis not prohibited by the statute. The factors to be considered should include the plaintiff's allegations concerning the racial or racist motivations of the defendant. In addition, the court should weigh the plaintiff's allegations regarding his own race or skin color. Equally important factors are the extent to which the plaintiff belongs to an identifiable group that is commonly or historically regarded by bigots or lay persons as constituting a "race," as the term is understood in a broad sense. Unless the plaintiff's allegations are inconsistent with the notion that he or she has suffered discrimination that is racial or racist in character, a cause of action has been stated and the plaintiff should be entitled to prove his or her claim. [Brief of the Anti-Defamation League of B'nai B'rith, *et al.*, at 21 (emphasis in original).]

below by Judge Wilkinson in dissent, would flood the federal courts or undercut the role of state courts. It is significant that the State of Maryland has acknowledged in this Court that "the available Maryland state law remedies do not afford appropriate redress for the true nature and magnitude of the injury actually inflicted." Brief Amicus Curiae the State of Maryland at 3. The state is not at all concerned that its power or activity in this area may be diminished; it urges this Court to reverse the Fourth Circuit and afford the protection of § 1982 to petitioners.

CONCLUSION

For all the foregoing reasons and those stated in petitioners' opening brief, the decision of the United States Court of Appeals for the Fourth Circuit should be reversed, and the Congregation should be given the opportunity to prove its claims under 42 U.S.C. §§ 1982 and 1985(3).[24]

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[24] Respondent appears to suggest, on the basis of language in two concurring opinions to this Court's decision in *Great American Fed. Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 379, 385 (1979), that the Congregation's § 1985(3) claim will not survive even if this Court overturns the Fourth Circuit's § 1982 holding. Brief for Respondent Remer at 8 n.5. The majority opinion in *Novotny* did not reach the issue whether § 1985(3) encompasses federal statutory rights, although the dissenting opinion argued persuasively that such rights were within the scope of the statute. 442 U.S. at 388 & n.5 (White, J., dissenting). The Court likewise declined to resolve the issue in *United Brotherhood of Carpenters & Joiners, Local 610* v. *Scott*, 463 U.S. at 832-33. Respondent correctly acknowledges that the Fourth Circuit previously has indicated that § 1985(3) encompasses federal statutory violations. *See McNutt* v. *Duke Precision*

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Dental & Orthodontic Laboratories, Inc., 698 F.2d 676, 679-80 (4th Cir. 1983). Indeed, respondent Remer conceded below that "[t]he rights protected by § 1985(3) are [applicable] to federal statutory and constitutional rights." (J.A.20) On the present record, in the event this Court reverses the Fourth Circuit's § 1982 holding, it should remand the case for reinstatement of the § 1985(3) claim.

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No. 85-2156

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SHAARE TEFILA CONGREGATION, ET AL.,
Petitioners,

v.

JOHN WILLIAM COBB, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE THE STATE OF MARYLAND

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FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE THE STATE OF MARYLAND

Pursuant to United States Supreme Court Rule 36.2, the State of Maryland submits this brief as amicus curiae in support of petitioners, Shaare Tefila Congregation. Because this brief is being sponsored and filed by a State, consent to its filing is not required. Sup. Ct. R. 36.4.

INTEREST OF THE AMICUS CURIAE AND SUMMARY OF ARGUMENT

The State of Maryland, like every state, has a strong interest in ensuring that none of its citizens are made targets of harassment calculated to interfere with the free exercise of their civil rights. This interest is particularly strong where, as in the present case, that harassment is motivated by virulent bigotry. Last year, 68 incidents of such harassment against Jews occurred in Montgomery County, where Shaare Tefila is located, alone. Montgomery County, Maryland, Human Relations Commission, Montgomery County Government Hate/Violence Incidents Fact Sheet (October 17, 1986). Harassment calculated to impress upon the members of a minority a bigoted individual's perception of them as inferior to the majority must be a matter of serious concern to the State.

The concurrence below suggested that Maryland law provides remedies for the dese-

cration of Shaare Tefila's synagogue that are both fully effective to redress the synagogue's injuries and more appropriate than the remedies under the federal civil rights laws. Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 528 (1986). However, Maryland's laws, like those of most states, do not take direct account of the bigotry underlying conduct such as that alleged in this case. For that reason, the available Maryland state law remedies do not afford appropriate redress for the true nature and magnitude of the injury actually inflicted.

The State of Maryland files this brief to urge reversal of the decision below and to stress the need to protect the victims of the kind of harassment and intimidation involved here through the remedy of the federal civil rights laws.

ARGUMENT

I. The injury inflicted on petitioners is interference with their civil rights.

This case involves far more than the mere painting of graffiti on the walls of a building. Shaare Tefila's synagogue is the center of a Jewish community. It is both the Congregation's place of worship and its members' place of assembly for community activities. 785 F.2d at 524. Moreover, the slogans and symbols painted on the synagogue were not ordinary graffiti. They were instead a deliberate evocation of the horrors of the Holocaust, calculated to intimidate the members of the Jewish community and to cause them extreme mental and emotional distress.

The menace inherent in painting such phrases as "DEAD JEW," "DEATH TO THE JUDE," and "IN, TAKE A SHOWER JEW" on the walls of a synagogue is unmistakable. The purpose of such an act is equally unmistakable. The

perpetrators sought to intimidate the Jewish minority, to deter its members from exercising their most basic civil rights - to hold property, assemble, and worship on an equal footing with the majority.

Hence, the injury to the petitioners in this case is not only the physical damage to their synagogue, nor even solely the emotional distress that they suffered as a natural result of that damage. The injury for which petitioners seek redress - and the conduct that cries out for relief - is gross and direct interference with petitioners' civil rights because of their membership in a minority group.

This suit seeks redress not simply for conduct that damages property and affronts the victims' sensibilities. Rather, the petitioners have been injured by uniquely abhorrent conduct: the deliberate infliction of injury that asserts the victims' alleged

inferiority and unworthiness to live at peace and in equality with the majority.

II. State law does not afford adequate redress for or protection from interference with civil rights.

Some states have enacted statutes that directly sanction deprivations of civil rights on account of the victim's membership in a minority group, by punishing such conduct as criminal or by affording the victim a civil cause of action. National Institute Against Prejudice & Violence, Striking Back at Bigotry: Remedies Under Federal and State Law for Violence Motivated by Racial, Religious, and Ethnic Prejudice 61-63, 81-84 (1986). A bill introduced in the Maryland General Assembly in 1983 would have increased the penalties for such crimes as malicious mischief if the crimes were committed "because of the race, religion, color, or

national origin of another individual" and would have given the victim in such cases a civil cause of action. Maryland Senate Bill 691 (1983). Because the bill was not enacted, Maryland - like most states - has no general civil rights statute.

To be sure, criminal acts such as those often committed by persons with a racial, ethnic, or religious animus are prohibited by Maryland criminal law. E.g., Md. Ann. Code Art. 27, §10A (burning cross or other religious symbol on public or private property without owner's consent); Art. 27, §555B (making anonymous telephone calls to annoy, torment, harass, or embarrass). Nonetheless, such statutes do not take account of whether a particular defendant was motivated by animus toward a minority group.[1]

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[1] For example, the criminal charges for the synagogue desecration in this case arose under Md. Ann. Code Article 27, §111, which makes it a misdemeanor to "wilfully and maliciously destroy, injure, deface or molest any real or (Continued)

Criminal laws are ill-designed and not intended to impress upon a defendant, and others of like mind, that harassment and intimidation of minority groups have no place in a democratic society. The intent of a defendant to harass and intimidate the members of a minority group in the exercise of their civil rights plays no part in the proof of the crime.

Moreover, a defendant's indictment and trial on any applicable charges is largely dependent on prosecutorial discretion. That discretion is exercised in Maryland by an independent State's Attorney in each of the 23 counties and the City of Baltimore, subject to no statewide policy governing its exercise. Murphy v. Yates, 276 Md. 475, 494-

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personal property of another." That crime may be committed by any act done with intent to cause damage or in wilful disregard of the plain and strong likelihood of damage and without justification, excuse, or mitigation. Spears v. State, 38 Md. App. 700, 708, 382 A.2d 616, 620-21, cert. denied, 282 Md. 739 (1978).

95, 348 A.2d 837, 848 (1975). Additionally, conviction may be had only on proof beyond a reasonable doubt that the particular defendant before the court committed the particular crime charged.

In consequence, the efficacy of criminal sanctions against even the defendant's overt acts of destruction of property, for example, may be significantly limited by practical and legal factors wholly extraneous to society's abhorrence of those acts' discriminatory motivation. Furthermore, to the extent that the perpetrators of any civil rights violation go unpunished, our society's ability to deter further depredations on the rights of minorities is undercut, and our commitment to such fundamental values as equal justice under law is diminished.

Civil proceedings in general have preventative advantages over criminal proceedings, as they are initiated by the

victim and are established by proof by a preponderance of the evidence. Yet, like the general criminal laws, traditional civil causes of action take no account of a defendant's bigoted motivations. Accordingly, traditional state tort law is no more effective than general criminal law to impress upon such a defendant the opprobrium with which the community and the state view unlawful acts grounded in bigotry. Those whose prejudice would lead them to interfere with a minority group's civil rights must be made aware that such interference - and not merely the overt acts by which it is accomplished in a particular case - will not be tolerated. Nothing less is likely to deter such persons from further discriminatory conduct.

Simply put, a traditional tort action will not vindicate the real interest that has been invaded in this case. Common law

actions of trespass and nuisance protect the interests in exclusive possession and full enjoyment of land that are common to any owner or occupant.[2] Thus, those actions would afford Shaare Tefila relief only for the unauthorized entry onto its property and the unsightliness of the vandalism, ignoring the discriminatory purpose that underlay the physical damage and the vastly more damaging consequences to the Congregation from this kind of vandalism.

This form of state tort action might indeed be sufficient if Shaare Tefila had been hit by vandals merely looking for any convenient wall on which to spray-paint their nicknames. But it defies both historical sensibility and present reality to maintain that trespass or nuisance causes of action

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[2] Nissan Motor Corp. in U.S.A. v. Maryland Shipbuilding & Drydock Co., 544 F.Supp. 1104, 1116 (D. Md. 1982), aff'd, 742 F.2d 1449 (4th Cir. 1984).

speak to the desecration of Shaare Tefila's synagogue with anti-Semitic slogans and symbols.

Even the common law action for intentional infliction of emotional distress is totally inadequate to the outrageous conduct involved in this case. Here, much more than the petitioners' emotional tranquillity was invaded.[3] The far more important invasion was to their right, as a minority group, to full enjoyment of the civil rights enjoyed by the majority. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 420 (1968).

III. The federal civil rights statutes offer appropriate redress.

The dissent below recognized that the civil rights statutes were expressly designed

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[3] See Harris v. Jones, 281 Md. 560, 570-72, 380 A.2d 611, 616-17 (1977).

to protect against the very sort of bigoted harassment committed in this case. "The Civil Rights Act of 1871, also known as the Ku Klux Klan Act, was designed precisely to provide a federal remedy for activities such as those found in this case. See Griffin v. Breckenridge, 402 U.S 88, 91 S.Ct. 1790 (1971)." Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 534 (4th Cir. 1986) (Wilkinson, J., concurring in part and dissenting in part).

A review of the acts of racial intimidation that triggered passage of the Civil Rights Acts demonstrates the identity of motivation between those incidents and the incident at issue here. The cross-burning, night-riding and defacement of property that inflamed the post-Civil War South were motivated by the view that blacks were an inferior group, not entitled to enjoy the right of full citizenship. Jones v. Alfred

H. Mayer Co., 392 U.S. at 427-29. The defacement of Shaare Tefila's synagogue was likewise motivated by a perception of Jews as an inferior group not entitled to assemble, worship, and hold property on an equal footing with the majority.

The legislative history of the civil rights statutes makes abundantly clear that Congress was well aware of the need to prevent such depredations in order to protect these basic rights. "Wilson lobbied for passage of the bill on the basis that it would 'protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men.'" Ortiz v. Bank of America, 547 F.Supp. 550, 555 (E.D. Cal. 1982), citing Cong. Globe, 39th Congress, 1st Sess. at 118.

The civil rights statutes thus afford - and were intended to afford - a system of

"personalized" justice that is directly addressed to the injury. Cf. Shaare Tefila Congregation v. Cobb, 785 F.2d at 528. The petitioners' very right to live unmolested within the community has been attacked precisely and only because of their membership in a minority group. The only adequate remedy for that injury is the one designed to provide redress for just such violations of civil rights. That remedy - lacking in Maryland law as in the laws of most states - is precisely what the federal civil rights statutes were intended to provide.

> "In enacting the Civil Rights Act of 1866, Congress intended at the very least to supplement state laws.... To now relegate these matters exclusively to state law simply disregards the nature and scope of federal remedies provided by Congress and the unique capacity of federal law to voice a strong and uniform commitment to the eradication of discrimination in our midst."

Shaare Tefila Congregation v. Cobb, 785 F.2d at 534 (Wilkinson, J.).

CONCLUSION

For the foregoing reasons, amicus the State of Maryland urges this Court to reverse the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Nos. 85-2156 & 85-2169

IN THE

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OCTOBER TERM, 1986

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JOHN WILLIAM COBB, *et al.*,
Respondents.

SAINT FRANCIS COLLEGE, *et al.*,
Petitioners,
v.
MAJID GHAIDAN AL-KHAZRAJI,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Third Circuits

MOTION FOR LEAVE TO FILE AND BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN JEWISH COMMITTEE, THE AMERICAN CIVIL LIBERTIES UNION, THE INTERNATIONAL NETWORK OF CHILDREN OF JEWISH HOLOCAUST SURVIVORS, THE AMERICAN GATHERING AND FEDERATION OF JEWISH HOLOCAUST SURVIVORS, THE JEWISH WAR VETERANS, THE INSTITUTE OF JEWISH LAW, AND THE CAPITAL LEGAL COUNCIL OF B'NAI B'RITH AS AMICI CURIAE SUPPORTING PETITIONERS SHAARE TEFILA CONGREGATION, ET AL., AND RESPONDENT MA GHAIDAN AL-KHAZRAJI

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MOTION OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN JEWISH COMMITTEE, THE AMERICAN CIVIL LIBERTIES UNION, THE INTERNATIONAL NETWORK OF CHILDREN OF JEWISH HOLOCAUST SURVIVORS, THE AMERICAN GATHERING AND FEDERATION OF JEWISH HOLOCAUST SURVIVORS, THE JEWISH WAR VETERANS, THE INSTITUTE OF JEWISH LAW, AND THE CAPITAL LEGAL COUNCIL OF B'NAI B'RITH FOR LEAVE TO FILE A BRIEF AMICI CURIAE

The Anti-Defamation League of B'nai B'rith, the National Association for the Advancement of Colored People, the American Jewish Committee, the American Civil Liberties Union, the International Network of Children of Jewish Holocaust Survivors, the American Gathering and Federation of Jewish Holocaust Survivors, the Jewish War Veterans, the Institute of Jewish Law, and the Capital Legal Council of B'nai B'rith, pursuant to Rule 36.3, hereby move for leave to file the attached brief *amici curiae* supporting the petitioners in *Shaare Tefila Congregation* v. *Cobb*, No. 85-2156, and the respondent in *Saint Francis College v. Al-Khazraji*, No. 85-2169. Consent to file this brief has been obtained from counsel for all parties to No. 85-2169; letters expressing that consent have been lodged with the Clerk of the Court. With respect to No. 85-2156, consent to file the brief has been obtained from all of the petitioners and from the only respondent who has entered an appearance in this Court; letters expressing such consent have been filed with the Clerk of this Court. Because the *amici* have been unable to obtain consent from the remaining respondents in No. 85-2156, most of whom could not be located, this motion is necessary.

The background and concerns of the *amici* are fully set forth in the Interest of *Amici Curiae* section of the attached brief. In sum, the Anti-Defamation League, the NAACP, the Lawyers' Committee for Civil Rights Under Law, the American Jewish Committee, and the American Civil Liberties Union have sought for several decades to promote good will and mutual understanding among all Americans and to combat racial and religious prejudice in the United States. Over the years, each organization has appeared frequently before this Court as *amicus curiae* to advance constructions of the constitution and federal civil rights laws that would ensure appropriate federal remedies for victims of racial, religious, and other forms of discrimination. The International Network and the American Gathering are organizations of Jewish

survivors of the Nazi holocaust and their children. The Jewish War Veterans is comprised of Jewish individuals who have served in the American armed forces. The Institute of Jewish Law is concerned with research and scholarship in the field of Jewish legal studies. The Capital Legal Council of B'nai B'rith is comprised of Jewish members of the bench, bar, and related professions.

The *amici* believe that this Court should confirm the rule of law that extends to Arabs, Jews, and other minority and ethnic group members the remedies provided in section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982. The *amici* organizations and their members bring to the issues raised in this case perspectives and experiences that are broader than and different from those of the parties. On October 6, 1986, many of these *amici* were granted leave to file a brief, and did file a brief, urging that *certiorari* be granted in No. 85-2156. The *amici* now respectfully seek the Court's leave to file the attached brief on the merits.

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QUESTION PRESENTED

Whether Arabs, Jews, and other minority group members who do not belong to distinct "non-white races," but who are the victims of racially-motivated discrimination, are entitled to seek relief under section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Nos. 85-2156 & 85-2169

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

v.

JOHN WILLIAM COBB, *et al.*,
Respondents.

SAINT FRANCIS COLLEGE, *et al.*,
Petitioners,

v.

MAJID GHAIDAN AL-KHAZRAJI,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Third Circuits

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BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN JEWISH COMMITTEE, THE AMERICAN CIVIL LIBERTIES UNION, THE INTERNATIONAL NETWORK OF CHILDREN OF JEWISH HOLOCAUST SURVIVORS, THE AMERICAN GATHERING AND FEDERATION OF JEWISH HOLOCAUST SURVIVORS, THE JEWISH WAR VETERANS, THE INSTITUTE OF JEWISH LAW, AND THE CAPITAL LEGAL COUNCIL OF B'NAI B'RITH AS AMIC CURIAE SUPPORTING PETITIONERS SHAARE TEFILA CONGREGATION, ET AL., AND RESPONDENT MAJID GHAIDAN AL-KHAZRAJI

This brief is submitted on behalf of the Anti-Defamation League of B'nai B'rith, the National Association for the Advancement of Colored People, the Lawyers' Committee for Civil Rights Under Law, the American Jewish Committee, the American Civil Liberties Union, the International Network of Children of Jewish Holocaust Survivors, the American Gathering and Federation of Jewish Holocaust Survivors, the Jewish War Veterans, the Institute of Jewish Law, and the Capital Legal Council of B'nai B'rith in support of the petitioners in *Shaare Tefila Congregation* v. *Cobb*, No. 85-2156, and the respondent in *Saint Francis College* v. *Al-Khazraji*, No. 85-2169. The brief is being filed jointly in the two cases because they pose similar issues, as recognized by this Court's Order of October 6, 1986, setting their oral arguments in tandem.

INTEREST OF AMICI CURIAE

B'nai B'rith, which was founded in 1843, is the oldest civic service organization of Jews in this country. The Anti-Defamation League of B'nai B'rith was formed in 1913, partially in response to the virulent anti-Semitism surrounding the Atlanta trial of Leo Frank, *see Frank* v. *Mangum*, 237 U.S. 309, 349-50 (1915) (Holmes & Hughes, JJ., dissenting). Throughout its history, the Anti-Defamation League has sought, as its charter prescribes, "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." The Anti-Defamation League remains vitally interested in protecting the civil rights of all persons and in assuring that every individual receives equal treatment under the law regardless of his or her race, religion, or ethnic origin.

In support of these objectives, the Anti-Defamation League has for several decades filed *amicus curiae* briefs in this and other courts. These briefs, including several

dealing with the statute at issue in this case, have, as appropriate, urged the unconstitutionality or illegality of racially-discriminatory laws and practices and the provision of appropriate federal remedies to victims of such discrimination. *See, e.g., Bob Jones University* v. *United States*, 461 U.S. 574 (1983); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Brown* v. *Board of Education*, 347 U.S. 483 (1964); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

The Anti-Defamation League's interest in these cases arises both from its general goals of promoting and securing tolerance and equal justice and from its history of fighting anti-Semitic hatred and violence. The Fourth Circuit decision in the *Shaare Tefila* case, if left standing, would deprive victims of anti-Semitic conduct of an important federal civil rights remedy. Moreover, the rule articulated in that decision would bar this essential remedy to members of many other minority or ethnic groups, including Arabs such as respondent in the *Saint Francis College* case. Accordingly, the Anti-Defamation League and the other *amici* appear to urge this Court clearly to hold that section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982, protects all victims of racially-motivated discrimination.

The National Association for the Advancement of Colored People is a New York non-profit corporation. Among its principal aims are the promotion of equality of rights and the eradication of caste or race prejudice among the citizens of the United States.

The Lawyers' Committee for Civil Rights Under Law is a national civil rights organization that was formed in 1963 at the request of President Kennedy to provide legal representation to blacks who were being deprived of their civil rights. The Lawyers' Committee has been ac-

tive throughout its history in pursuing legal remedies on behalf of the victims of racial discrimination.

The American Jewish Committee is a national organization, founded in 1906 and dedicated to the preservation of civil rights and harmonious relations among Americans of different backgrounds. The Committee believes that the protection of civil rights for all best secures the rights of Jewish Americans.

The American Civil Liberties Union is a non-profit membership organization dedicated to protecting the fundamental rights of the people of the United States.

The International Network of Children of Jewish Holocaust Survivors, through affiliated groups in the United States, Canada, Israel, and Europe, represents five thousand sons and daughters of European Jews who survived the Nazi holocaust. The American Gathering and Federation of Jewish Holocaust Survivors is an umbrella organization representing the interests of tens of thousands of survivors of the holocaust living in the United States.

The Jewish War Veterans, founded in 1896, is the oldest active veterans' organization in the United States. It was established to oppose anti-Semitism and to call attention to the contributions of Jews to American military history.

The Institute of Jewish Law, an organization affiliated with Touro College Jacob D. Fuchsberg Law Center, was founded in 1980 to facilitate research and scholarship in the field of Jewish legal studies.

The Capital Legal Council of B'nai B'rith is a joint unit of B'nai B'rith and B'nai B'rith Women. Composed of Jewish members of the bench, bar, and related professions, it seeks to strengthen through study and advocacy those traditional Jewish precepts—the rule of law, the freedom and dignity of the individual, and the importance of religious freedom—that are at the core of the American experiment.

SUMMARY OF ARGUMENT

These cases present the issue of whether minority and ethnic group members who do not belong to distinct "non-white races," but who allege discrimination of a racial or racist character, are entitled to invoke section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982. In one case, a Jewish congregation's lawsuit seeking relief for the admittedly racist desecration of its synagogue was dismissed because Jews are not members of a distinct "non-white" race. *Shaare Tefila Congregation*, Pet. App. A, at 7a. In the other case, the lower court expressly rejected such a narrow construction of the statute and held that an Arab alleging racially-motivated discrimination, despite his taxonomic classification as a Caucasian, could state a cause of action under the statute. *Saint Francis College*, Pet. App. at 25a-27a. Presumably because of this clear conflict, the Court granted *certiorari* and has set the cases for argument in tandem.

The controlling precedents of this Court, the legislative history of the statute, and the plain realities of racial prejudice require that the Court confirm that the Civil Rights Act of 1866 protects all victims of racial discrimination. While this Reconstruction-era statute was intended principally to protect blacks from victimization by whites, this Court previously has removed any doubt that the Act protects whites and non-whites alike from discrimination that is racial in character. Accordingly, and notwithstanding their Caucasian racial status, Arab and Jewish victims alleging racially-motivated discrimination do in fact state claims under the Civil Rights Act of 1866. Unless the plantiff's allegations are inconsistent with the notion of racial discrimination broadly construed, the plaintiff is entitled to proceed to his or her proof and, if successful, to obtain the relief provided by sections 1981 and 1982.

ARGUMENT

I. The Language and Legislative History of the Civil Rights Act of 1866 Confirm That the Statute Protects White and Non-White Minority and Ethnic Group Victims of Racially-Motivated Discrimination.

Section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982, extends to "all persons" various enumerated rights on the same terms as those rights are "enjoyed by white citizens."[1] Ten years ago, this Court held unambiguously that one need not be "non-white" to invoke the statute. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287 (1976). Prompted however by *McDonald*'s dictum that the statute deals with discrimination that is racial in character, *id.*, the lower federal courts, in the intervening years, have devised numerous and conflicting tests by which the statute's coverage is withheld from or extended to various groups that may not technically qualify as distinct "non-white races." The decisions of the courts of appeals in the cases below, involving Jewish and Arab plaintiffs, reflect at least two of the different and inconsistent approaches.

The decision of the Fourth Circuit in the *Shaare Tefila* case clearly conflicts with the statute and its legislative history. That decision would require a plaintiff to

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[1] While respondent in *Saint Francis College* invoked section 1981, petitioners in *Shaare Tefila* sought relief under sections 1981 *and* 1982. Presumably because their section 1981 claim was dismissed on alternative grounds, including the one at issue here, petitioners in *Shaare Tefila* sought review only of the lower courts' disposition of their section 1982 claim. Recognizing the congruence of the statutory language, legislative history, and decided cases for purposes of resolving the question presented, this brief does not distinguish between the two sections. Sections 1981 and 1982 both originated in section 1 of the Civil Rights Act of 1866. Where, as here, the relevant language is the same in both statutes, there is "no reason to construe these sections differently." *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973); *accord, Runyon* v. *McCrary*, 427 U.S. 160, 171 (1976).

establish his membership in a distinct "non-white race" in order to invoke the Act. As the discussion below confirms, the language of the statute contains no such restriction, and instead was intended to protect all victims of discriminatory conduct of a racial or racist character; Congress clearly anticipated that such conduct would be actionable when directed at members of a wide array of minority or ethnic groups.

A. *The Racial Character of the Discrimination Rather Than the Racial Status of the Plaintiff is the Focus of the Statute.*

This Court's inquiry in the first instance should focus on the language of the statute. In sweeping terms, the Act's protections are afforded to "all persons." There are no words specifically limiting the class of intended beneficiaries to members of certain races, "white" or "non-white." Indeed, the word "race" does not appear in the statute as presently codified.

Despite the apparent breadth of the Act, the Fourth Circuit panel below affirmed the dismissal of petitioners' claims because Jews are not members of a "racially distinct group" that is "commonly considered to be non-white[]." *Shaare Tefila*, Pet. App. A, at 7a. The unarticulated rationale must have been that because Jews are "white," they cannot suffer discrimination cognizable under the statute at the hands of other whites. As the majority and concurring opinions of the Third Circuit panel in *Saint Francis College* demonstrate, the statute and this Court's prior constructions of the statute will not allow such a limited reading. Pet. App. at 23a-24a; *id.* at 31a-32a (Adams, J., concurring).

In *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), the Court considered whether white persons alleging that they had suffered discrimination resulting from favoritism to blacks could invoke the

statute. Construing the same statutory language—"all persons" entitled to the same rights "enjoyed by white citizens"—the Court squarely held that one need not be "non-white" to state a claim under the statute. *Id.* at 287.

The Court in *McDonald* emphasized that "the statute explicity applies to '*all* persons' (emphasis added), including white persons." *Id.* (emphasis and parenthetical in original). The statute's qualifying phrase—"as is enjoyed by white citizens"—was designed not to limit the statute's applicability to non-whites, but rather "to emphasize the racial character of the rights being protected." *Id.* (quoting *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966)). *Rachel*, upon which the Court relied in *McDonald*, and its companion case, *City of Greenwood* v. *Peacock*, 384 U.S. 808 (1966), decided under the removal provisions of the 1866 Civil Rights Act, involved state criminal prosecutions of groups of civil rights workers. As in *McDonald*, the Court considered the nature of the conduct, not the race of the person alleging discrimination, in determining the availability of the federal remedy. *Rachel*, 384 U.S. at 791, 805.

This Court adopted precisely the same construction—one stressing the character of the rights being protected, rather than the "race" of the plaintiff—in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), where the Court pointed out that "*all* racially motivated deprivations of the rights enumerated in the statute" are covered. *Id.* at 426 (emphasis in original). Indeed, once one accepts *McDonald*'s holding that whites and non-whites alike can invoke the statute, racial *status* should become largely irrelevant; racial motivation and character should become the central issues. This conclusion is also supported by the consistent line of cases permitting a white associating with a black to seek relief under the statute for discriminatory conduct motivated by that association. *See Tillman* v. *Wheaton-Haven Recreation*

Ass'n, 410 U.S. 431, 434 (1973); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969); *Woods-Drake* v. *Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982). In such cases, the plaintiff's claim is based not on his or her racial status, but on the racial character of the rights protected.

The panel in *Shaare Tefila* disregarded the holdings of this Court and refused to consider the racial character of the conduct and rights involved. Instead, looking solely at the "race" of the plaintiffs, it held that since Jews are not "non-whites," no cause of action possibly could be stated. But given the uncontradicted admissions that the defendants in *Shaare Tefila* acted upon a belief that their Jewish victims belonged to a distinct and inferior non-white race,[2] a cause of action premised on the established racial character of defendants' conduct was stated under this Court's holding in *McDonald*.[3] As the panel in *Saint Francis College* recognized, the statute does not require a plaintiff to prove his "racial pedigree," but rather to allege that his membership in a distinct group has subjected him to "racially-based" prejudice. Pet. App. at 26a. This Court should reverse the Fourth Circuit's decision and reaffirm that neither the statute nor this Court's prior decisions require a section 1981 or 1982 plaintiff to establish membership in a distinct "non-white" race.

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[2] *See Shaare Tefila*, Pet. App. A, at 12a-13a (Wilkinson, J., dissenting); Brief for Appellees at 5, *Shaare Tefila* v. *Cobb* (4th Cir. 1986).

[3] The "racial character" of alleged discrimination may be pleaded in a variety of ways, and could include allegations of racial animosity on the part of the defendants, plaintiff's membership in a group perceived to constitute a "race" or that is typically subject to prejudice with racial overtones, or by other assertions that suggest racial or racist conduct. The types of allegations that would satisfy a "racial character" requirement are explored more fully in Part III, *infra*.

B. *The Statute Was Intended to be Construed Broadly and to Protect Minority and Ethnic Group Members Regardless of Whether They Belong to Distinct Non-White Races.*

This Court has repeatedly emphasized that the Civil Rights Act of 1866 should be generously applied and it has insisted that " 'ingenious analytical instruments' . . . [not be employed] to carve . . . exception[s]" from the statute. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968) (quoting *United States* v. *Price*, 383 U.S. 787, 801 (1966)).[4] The *McDonald* Court rejected such an "analytical instrument" when it determined to emphasize the "racial character" of the rights and conduct involved, rather than the racial status of the plaintiff. In giving content to this concept of "racial character" and determining the rights Congress intended to protect under sections 1981 and 1982, the Act should be construed broadly. The propriety of such a broad construction is clearly justified by the legislative history of the statute, which demonstrates that the concept of "race" as understood and used by the 39th Congress was meant to encompass a far broader range of groups than just the "non-whites" protected by the Fourth Circuit below.

Introducing the Civil Rights Act of 1866, Senator Trumbull described the bill as intended "to protect all persons in the United States in their civil rights" and emphasized that it applied to "every race and color." Cong. Globe, 39th Cong., 1st Sess. 211 (1866). Representative Wilson, Chairman of the House Judiciary Committee and the bill's floor manager in the House, stressed that the measure would "protect our citizens, from the

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[4] *See City of Memphis* v. *Greene*, 451 U.S. 100, 120 (1981) (statute's language to be "broadly construed"); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) ("narrow construction of the language . . . would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded").

highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men." *Id.* at 1118.

While there can be no doubt that the Act was intended primarily to protect the rights of blacks, it is likewise clear that Congress did *not* intend to limit "race" by a color-based definition. In overriding President Johnson's veto of the Act, Congress reaffirmed that:

> "This bill, in that broad and comprehensive philanthropy which regards all men in their civil rights as equal before the law, is not made for any *class or creed, or race or color*, but in the great future that awaits us will, if it become a law, *protect every citizen, including the millions of people of foreign birth who will flock to our shores* to become citizens and to find here a land of liberty and law."

Id. at 1833 (emphasis supplied). As this passage demonstrates, sections 1981 and 1982 were never intended by Congress to apply solely to non-whites, but rather, as the statute provides, to "all persons." [5]

The term "race," as used in the debates, was meant to be given a broad meaning so that it would encompass every "class or creed, or race or color." *Id.* This broad meaning is evident in Representative Shallabarger's statement:

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[5] In an extended analysis of the statute's legislative history, this Court observed in *McDonald* that the Act "was routinely viewed, by its opponents and supporters alike, as applying to the civil rights of whites as well as non-whites." 427 U.S. at 289. After examining the background of the statute's enactment, one district court recently concluded that "the legislative history indicates that (perhaps except for distinctions based on gender and age) Congress intended to ensure that all citizens were to enjoy the same civil rights." *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 555 (E.D. Cal. 1982); *see also* Note, *National Origin Discrimination Under Section 1981*, 51 FORDHAM L. REV. 919, 934 & n.104 (1983) (indicating that Congress intended gender and age to be the only limitations on the statute's scope).

> "Who will say that Ohio can pass a law enacting that no man of the German race, and whom the United States has made a citizen of the United States, shall ever own any property in Ohio . . . . If Ohio may pass such a law, and exclude a German citizen . . . because he is of the German nationality or race, then . . . you have the spectacle of an American citizen admitted to all its high privileges and entitled to the protection of his Government . . . and yet that citizen is not entitled to either contract, inherit, own property, work, or live upon a single spot of the Republic, nor to breathe its air."

Id. at 1294; *see also id.* at 1757 (noting President Johnson's objection that the bill would make citizens of "Chinese and Gypsies").

The legislative history of the statute, including the generalized comments in that history about members of different "races," must also be read in light of the common understanding of the term "race" at the time.[6] A leading contemporary dictionary defined "race" as follows: "A race is the series of descendants indefinitely. Thus all mankind are called the *race* of Adam; the Israelites are of the *race* of Abraham and Jacob." N. Webster, *An American Dictionary of the English Language* 903 (C. Goodrich rev. Springfield, Mass. 1860) (emphasis in original). This sweeping contemporaneous understanding of "race" confirms that all types of groups were intended to benefit from the Act.

This Court should embrace that common and broad understanding of "race," not only because it conforms to the legislative history context, but because it is the correct and traditional method of interpreting the statute. In addressing the meaning of racial terminology, this Court has previously noted:

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[6] At least one of the opponents of the Act noted during floor debate the imprecise and potentially boundless meaning of "race." *See* Greenfield & Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662, 672 (1975).

> "It is in the popular sense of the word, therefore, that we employ it as an aid to the construction of the statute, for it would be obviously illogical to convert words of common speech used in a statute into words of scientific terminology when neither the latter nor the science for whose purposes they were coined was within the contemplation of the framers of the statute or of the people for whom it was framed. The words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken."

United States v. *Bhagat Singh Thind*, 261 U.S. 204, 209 (1923); *see also Morrison* v. *California*, 291 U.S. 82, 85-86 (1934). Against this background, the legislative history demonstrates that any "scientific" limitation of the Act to distinct "non-white races" would be ill-founded.

The Civil Rights Act of 1866 was adopted against the background of sectional conflict by men who had seen the Nation's future threatened by issues of race and status. They were determined that, henceforth, "all persons" would be relieved of disabilities and harm by reason of any involuntary status attributed to ancestry, physiognomy, or ethnicity. Knowing well the dangers of group antagonism, they sought safety for the Nation by declaring that no American could be treated as an alien subject to intimidation, suppression, or expulsion from the civic community. The Civil Rights Act of 1866 must be read to have a reach as broad as this purpose.

II. Federal Remedies for Racially-Discriminatory Conduct Should Not be Limited by Narrow and Arbitrary Definitions of "Race."

The Fourth Circuit panel below—despite the uncontradicted evidence of the racist character of the synagogue desecration—dismissed petitioners' claims because Jews do not belong to a distinct "non-white" race. *Shaare Tefila*, Pet. App. A, at 7a. The panel determined that the defendants' belief that Jews are members of a

separate and inferior "race" was unfounded and hence held that their conduct could not be actionable as racial discrimination. In essence, the lower court purported to "excuse" defendants' admitted racism because defendants' racist conduct lacked a sound scientific basis. Such a narrow interpretation of the statute's scope both ignores the true character of racism and illustrates the inappropriateness of restrictive judicial definitions of race.[7]

Judge Seth, in considering the applicability of the statute to minority groups, aptly observed that racists are "poor anthropologists" and that racial "[p]rejudice . . . . is based on all the mistaken concepts of 'race.'" *Manzanares* v. *Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979); *see also Shaare Tefila*, Pet. App. A, at 11a (Wilkinson, J., dissenting); S. Washburn, *The Study of Race*, in *The Concept of Race* 243, 254 (A. Montagu ed. 1964). This connection between misbegotten notions of race and racial prejudice is a commonplace. But such misbegotten notions must not be ignored if the statute is to apply to "*all* racially motivated deprivations of . . . rights," *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968) (emphasis in original).

On the theory that defendants' "subjective, irrational perceptions" that Jews are a race should not be controlling, the Fourth Circuit panel below refused to permit the plaintiffs to invoke the statute. *Shaare Tefila*, Pet. App. A, at 7a. This holding not only clashes with this Court's recognition that the statute applies to "*all* racially motivated" conduct; it also ignores the fact that anti-Semitism has long been the product of such racial misperceptions. The racist motivations of defendants in

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[7] The *amici* reject the notion that Arabs or Jews should be classified as members of a distinct "race," but, as made clear throughout this brief, submit that the statute must be construed to cover acts of racism against Arabs and Jews.

Shaare Tefila are similar to the motivations that have animated anti-Semitic conduct for centuries.

A recent study of the character of anti-Semitism observed that:

> "In medieval times hostility to the Jew, whatever its underlying social or psychological motivations, was defined primarily in religious terms. From the fifteenth century onward this was no longer true, and Jew hatred was redefined, becoming at first partly, and then, at least in theory, wholly racial."

B. Lewis, *Semites and Anti-Semites* 81 (1986). The predominantly racist content of anti-Semitism, from at least the time of the Spanish Inquisition through Nazi Germany to present-day America, is a matter of historical record. *See id.* at 26-33, 81-100; T. Gossett, *Race: The History of an Idea in America* 9-12, 292-93, 371-72, 449 (1963); *see also Shaare Tefila*, Pet. App. A, at 16a-17a (Wilkinson, J., dissenting); *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 567 (E.D. Cal. 1982). Six million Jews were not murdered in the holocaust as a result of differences in religious doctrine; they were the victims of a twisted and avowedly racist Nazi ideology that measured Jewishness by blood rather than belief. Hence, application of the statute to Jews would not require a court to indulge the isolated racist idiosyncracies of individual defendants. The history of anti-Semitism amply, if not tragically, demonstrates its pervasive racist character.

Similarly, discrimination against Arabs has long assumed a decidedly racist cast. Arabs include natives of Near Eastern countries such as Syria, Egypt, Yemen, Lebanon, Iraq, and Saudi Arabia, and their descendants. Though Arabs are taxonomically classified as Caucasian, they often (though certainly not invariably) have a skin color darker than that of Caucasians of European descent. Bigots have seized upon Arabs' supposedly distinctive physical and ethnic qualities in stereotyping and discriminating against them. Examples of explicitly racist

anti-Arab epithets and conduct have surfaced with dismaying frequency in recent years.[8]

An obvious irony of the consolidation of these cases is that both Jews and Arabs fall within the crude rubric "Semite," which technically is a language classification, though it also has long had racial connotations. *See* G. Barton, *A Sketch of Semitic Origins* 28 (1902); B. Lewis, *Semites and Anti-Semites* 44-45, 50 (1986).[9] Racists, among others, have lumped Arab and Jew together as targets of discrimination. For example, a restrictive land covenant successfully challenged in the early 1970's forbade transfer " 'to any person of the Semitic *race*, blood or origin, which racial description shall be deemed to include Armenians, Jews, Hebrews, Persians and Syrians. . . .' " *Mayers* v. *Ridley*, 465 F.2d 630, 631 n.2 (D.C. Cir. 1972) (emphasis supplied). It is clear that bigots have historically treated Jews and Arabs—sometimes separately, sometimes together—as racially distinct from the "white" majority.

The test of the Fourth Circuit, which requires proof of *actual* membership in a separate "non-white" race, ignores the fact that discrimination against Caucasian sub-groups such as Arabs and Jews frequently assumes an undeniably racist quality. Racially-motivated discrimination against Arabs and Jews is no different in kind or character from the bigotry directed at taxonomically-

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[8] *See, e.g.*, Dickey, *Falling Out of Love with the Arabs*, NEWSWEEK, Aug. 25, 1986, at 44 (describing a recent "surge of anti-Arab jingoism [and] increasing bigoted talk about 'camel jockeys' and 'sand niggers' "); Newell, *Arab-Bashing in America*, NEWSWEEK, Jan. 20, 1986, at 21.

[9] *See also* J. Worcester, *A Universal and Critical Dictionary of the English Language* 656 (Boston, Mass. 1874) (defining "Shemitic" as relating to various languages, including Arabic and Hebrew; defining "Shemitism" as "[t]he Shemitic race"). The term "Shemite" preceded that of "Semite," and is traceable to Shem, one of Noah's sons and the mythological forebear of the Shemites.

defined racial minorities. Adoption of a scientific "race test" would thus deny real victims of racist conduct an important remedy.[10]

Even if a "race test" arguably were appropriate for determining eligibility to invoke the Act, a restrictive, pseudo-scientific, color-based "race test" would be both improper and unseemly. In interpreting "race" for purposes of this civil rights law, even if the contemporary definition of race were not as broad as that at issue here, the correct approach would be to define the term and the statute as broadly as necessary to cover acts that are racial or racist in character. Both lay and scientific meanings admit to such sweeping applications.

It is commonly acknowledged that there is no definitional consensus in the scientific or academic community about "race." *See generally* A. Montagu (ed.), *The Concept of Race* (1964) (collecting various scholarly essays on topic); *see also United States* v. *Bhagat Singh Thind*, 261 U.S. 204, 212 (1923); J. Barzun, *Race: A Study in Superstition* 203-07 (1965). Indeed, to the extent that there is agreement, it is on the proposition that the purpose of any racial classification dictates its scope and content. *See Ortiz* v. *Bank of America*, 547 F. Supp. 550, 565-67 (E.D. Cal. 1982); S. Molnar, *Races, Types, and Ethnic Groups* 13 (1975). In the lay community, "race" remains an extraordinarily open-ended concept; it is defined as broadly in today's leading dictionaries as it was over 100 years ago, when the Civil Rights Act was passed.[11]

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[10] "Since the evil at which the statutes are aimed is discrimination, the scientific validity of the discriminator's racial definition is irrelevant." Greenfield & Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662, 678 (1975). In enforcing a statute designed to remedy racist conduct, the defendants' racist misperceptions must be considered, even if they are irrational and confused.

[11] *Compare Webster's Third New International Dictionary* 1870 (1981) ("descendants of a common ancestor" or "a class or kind of

Despite the fact that Arabs and Jews should *not* be classified as scientifically distinct "races," it is nonetheless true that each group has been considered to constitute a "race." The mistaken belief that Jews belong to a separate "race" is not only held by anti-Semites; many with benign attitudes towards Jews have referred to them as a "race." *See* A. Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* 353 (5th ed. 1974).[12] In fact, a standard dictionary in America still illustrates its definitions of "race" with unfortunate references to the "Hebrew race" and the "Jewish race." *Webster's Third New International Dictionary* 1870 (1981). *Cf.* N. Webster, *An American Dictionary of the English Language* 903 (C. Goodrich rev. Springfield, Mass. 1860) ("the Israelites are of the *race* of Abraham and Jacob") (emphasis in original).

Arabs are also popularly thought of as a separate "race." In terms that today would be regarded as racist,

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individuals with common characteristics, interests, appearance, or habits") *with* N. Webster, *An American Dictionary of the English Language* 903 (C. Goodrich rev. Springfield, Mass. 1860) ("the series of descendants indefinitely").

[12] *See, e.g., Hirabayashi* v. *United States*, 320 U.S. 81, 111 (1943) (Murphy, J., concurring) (wartime treatment of Japanese Americans "bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe."); *Near* v. *Minnesota*, 283 U.S. 697, 703 (1931) (Hughes, C.J.) ("Jewish Race"); I. Berlin, *Against the Current: Essays in the History of Ideas* 274-75 (1980) (describing Disraeli's theory of the "Jewish race"); G. Eliot, *Daniel Deronda* (1876) (sympathetic 19th Century fictional treatment of Jews laced with references to the "Jewish race"); Letter from Learned Hand to Charles H. Grandgent (Nov. 14, 1922) (urging that Harvard College not impose a "limitation based upon race" to restrict admission of Jews), *reprinted in* L. Hand, *The Spirit of Liberty* 21 (3d ed. 1974); *The Sun* (New York), Sept. 19, 1870, at 2, cols. 2-3 ("The Jews are not merely a church; they are a race. . . . The Jewish race is one of the most tenacious and strongly marked in all the history of man."), *reprinted in* M. Schappes (ed.), *A Documentary History of the Jews in the United States* 541 (3d ed. 1971).

a district court opinion dating back several decades soberly analyzed the group characteristics of Arabs and concluded that "as a class they are not white" and would not have been considered "white" by the Congress that enacted this country's first naturalization statute in 1790. *In re Hassan*, 48 F. Supp. 843, 845-46 (E.D. Mich. 1942). *But see Ex parte Mohriez*, 54 F. Supp. 941 (D. Mass. 1944). The notion that Arabs constitute a distinct race is not a new or novel one. *See* R. Benedict, *Race and Racism* 13 (1942) (describing different groupings of the Arab race).

While most racial labelling is misguided, the reality is that Arabs, Jews, and many other ethnic or minority groups have been widely, though erroneously, regarded as belonging to "races." Such beliefs merely reflect the way "race" has been understood from at least the 19th Century to this day in popular and even academic parlance. In the face of such open-ended understandings of "race" and the express purpose of the statute to remedy all racially-motivated acts of discrimination, a construction of the statute that seeks to limit its coverage to scientifically-verifiable "non-white races" is a misguided enterprise. Moreover, such an abstract and restrictive reading of the statute would leave countless victims of discrimination plainly racist in character without any effective remedy. The correct result is to apply the statute to all victims of racially-motivated discrimination and to avoid formulation of a technical "race test."

A restrictive reading of the statute—one which ignores the racial motivations of defendants and the broader understandings of "race" prevalent at the time of the Act or in some modern lay usage—would require the federal courts to devise such a "scientific" definition of "race" and to assume the role of arbiter of racial classifications. It could result in unseemly judicial inquiries into the racial background of litigants and the formula-

tion of artificial and technical racial distinctions.[13] The breadth of the statute, however, renders such a definitional role unnecessary because of its sweeping prohibition of all racially-motivated discrimination. This Court therefore should reject the color-based, "scientific" test of the Fourth Circuit panel below and make it clear that a plaintiff need not "prove his [racial] pedigree," *Saint Francis College*, Pet. App. at 26a, before he is permitted to invoke a statute that by its terms protects "all persons."

III. Section 1981 and 1982 Plaintiffs Should be Permitted to Proceed With Their Claims Unless Their Allegations Are Clearly Inconsistent With the Possibility That They Were the Victims of Racial Discrimination.

The central flaw of the Fourth Circuit's decision in *Shaare Tefila* is that it dismissed the Congregation's claim in the teeth of allegations of conduct that was unmistakably racial or racist in character. The defendants conceded that they believed Jews to constitute a separate and inferior non-white race. They desecrated plaintiffs' synagogue with anti-Semitic emblems redolent of racially-inspired Jew hatred. Moreover, Jews, though members of a religion, for centuries and to this day commonly have been thought of, albeit mistakenly, as a separate "race."

The correct rule of law at the pleading stage should be that allegations which, if proven, would establish discrimination that is racial in character are adequate to state a cause of action. In light of the purpose of the

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[13] *See* Note, *Legal Definition of Race*, 3 RACE REL. L. REP. 571 (1958) (reviewing statutory definitions of racial groups and judicial interpretations thereof, particularly as applied in the miscegenation context); *compare United States* v. *Bhagat Singh Thind*, 261 U.S. 204, 209-15 (1923) (high caste Hindu not a "free white person" for naturalization purposes) *with In re Mohan Singh*, 257 F. 209 (S.D. Cal. 1919) (reaching opposite result apparently undermined by the *Thind* case).

statute to combat racial discrimination in its various forms and the open-ended and imprecise meanings of "race" since 1866, it would be improper to screen potential plaintiffs by requiring allegations of membership in a "non-white race." The better approach would be to require only allegations of discrimination of a racial character.[14]

There are numerous factors—none of which is exclusive—that the courts should consider in determining whether a plaintiff has adequately pleaded and can plausibly assert that he was the victim of *racial* discrimination, as opposed to discrimination on some other basis not prohibited by the statute. The factors to be considered should include the plaintiff's allegations concerning the racial or racist motivations of the defendant. In addition, the court should weigh the plaintiff's allegations regarding his own race or skin color. Equally important factors are the extent to which the plaintiff belongs to an identifiable group that is commonly or historically regarded by bigots or lay persons as constituting a "race," as the term is understood in a broad sense. Unless the plaintiff's allegations are inconsistent with the notion that he or she has suffered discrimination that is racial or racist in character, a cause of action has been stated and the plaintiff should be entitled to prove his or her claim.[15]

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[14] Because the Arab and Jewish plaintiffs in these cases allege racial discrimination, the Court need not determine the extent to which the statute protects individuals claiming discrimination *solely* on the basis of national origin, *cf. Delaware State College* v. *Ricks*, 449 U.S. 250, 256 n. 6 (1980) (reserving question), or some other criterion.

[15] Numerous courts and commentators endorse an approach that goes beyond the "scientific" racial status of the plaintiff and includes inquiry into one or more additional factors, such as those described above, that are relevant to the racial character of discriminatory conduct. *See Alizadeh* v. *Safeway Stores, Inc.*, 802 F.2d 111, 114-15 (5th Cir. 1986); *Saint Francis College*, Pet. App. at

The test proposed is flexible and directs the court's attention to any and all factors relevant to the existence of racial discrimination. It recognizes that the racial status of the victim is not the only measure of racism. This test would also relieve the courts of the impossible and unseemly task of analyzing in a pseudo-scientific fashion the "races" of litigants. In short, it would acknowledge the true nature of racism and afford the statute's protection to all victims of racial discrimination. By any measure, the Arab and Jewish plaintiffs in these cases have pleaded discrimination that is racial in character.

CONCLUSION

For the foregoing reasons, the *amici* urge this Court to reverse the decision of the Fourth Circuit below, to affirm the ruling of the Third Circuit below, and to resolve these cases in a manner making clear that the Civil Rights Act of 1866 is available to all Arab and Jewish victims of racial discrimination.

25a-27a; *Erebia* v. *Chrysler Plastic Prod. Corp.*, 772 F.2d 1250, 1253-54 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1197 (1986); *Ramos* v. *Flagship International, Inc.*, 612 F. Supp. 148, 151 (E.D.N.Y. 1985); Greenfield & Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662 (1975). Other authorities maintain that there is no "racial" requirement and that virtually any victim of group-based discrimination may invoke the Act. *See Manzanares* v. *Safeway Stores, Inc.*, 593 F.2d 968, 971-72 (10th Cir. 1979); *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 568 (E.D. Cal. 1982); Note, *National Origin Discrimination Under Section 1981*, 51 FORDHAM L. REV. 919, 939, 942 (1983).

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IN THE

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v.
MAJID GHAIDAN AL-KHAZRAJI,
Respondent.

SHAARE TEFILA CONGREGATION, *et al.*,
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v.
JOHN WILLIAM COBB, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third and Fourth Circuits

MOTION FOR LEAVE TO FILE, AND BRIEF OF THE AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE AS AMICUS CURIAE SUPPORTING RESPONDENT MAJID GHAIDAN AL-KHAZRAJI AND PETITIONERS SHAARE TEFILA CONGREGATION, ET AL.

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On Writs of Certiorari to the United States Courts of Appeals for the Third and Fourth Circuits

---

MOTION OF THE AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American-Arab Anti-Discrimination Committee pursuant to Rule 36.2, hereby moves for leave to file the attached brief amicus curiae supporting the petition for writ of certiorari. Consent to file the brief has been obtained from all of the petitioners and from the only respondent who entered an appearance in this court, letters expressing such consent have been lodged with

the Clerk of this Court. Because the amicus has been unable to obtain consent from the remaining respondents, most of whom could not be located, this motion is necessary.

The background and concerns of the amicus are fully set forth in the Interest of Amicus Curiae section of the attached brief. In sum, the American-Arab Anti-Discrimination Committee has sought since its inception to promote mutual understanding among all Americans and to combat ethnic, racial, national origin and religious prejudice in the United States.

The amicus believes that the decision of the court below in *Shaare Tefila v. Cobb* improperly deprives Arabs, Jews and other minority group members of the protections afforded by 42 U.S.C. sections 1981 & 1982, and further compounds the confusion among the lower federal courts as to the proper scope of that statute, and that the decision of the 4th circuit in *Al-Khazraji v. Saint Francis College* represents a view of the coverage of these statutes which is more consistent with the intent of Congress and with the actual dynamics of racial discrimination.

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QUESTION PRESENTED

Whether 42 U.S.C. sections 1981 and 1982 protect Arabs, Jews and other groups, classified as "Caucasian", and not defined in terms of skin color, from discrimination based on a belief that they are racially distinct.

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On Writs of Certiorari to the United States Courts of Appeals for the Third and Fourth Circuits

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BRIEF AMICUS CURIAE OF THE AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE IN SUPPORT OF RESPONDENT MAJID GHAIDAN AL-KHAZRAJI AND PETITIONERS SHAARE TEFILA CONGREGATION, ET AL.

INTEREST OF AMICUS CURIAE

The American-Arab Anti-Discrimination Committee (ADC), which was founded in 1980 to defend the civil rights of people of Arab descent and to promote their rich ethnic heritage, is a grassroots advocacy organization based in Washington, D.C. The ADC serves a national membership of Arab-Americans, joined by persons of all ethnic origins, who are committed to challenging defamation and discrimination wherever they occur.

The ADC was founded partly in response to the ABSCAM operation and similar incidents of racial stereotyping of and discrimination against Arab-Americans. The ADC works toward protecting the civil rights of all people and assuring equal treatment under the law, regardless of race, religion, national origin, sex, or any other basis of invidious discrimination.

The American-Arab Anti-Discrimination Committee's interest in these cases stems from its general goals of promoting and securing civil rights and equal justice, from its mission to fight discrimination and violence against Arab-Americans, and from its own experience as a target of such discrimination. The ADC has been the victim of several violent incidents, which the FBI believes were perpetrated by extremist groups who seek to interfere with Arab-Americans' exercise of their civil rights. Accordingly, the ADC appears as *amicus curiae* to urge this Court to hold that 42 U.S.C. sections 1981 and 1982 protect all victims of racially-motivated discrimination and violence.

SUMMARY OF ARGUMENT

These cases raise the issue of whether Arabs, Jews and other groups not defined in terms of skin color and taxonomically classified as Caucasian, but subject to discrimination on the basis of a belief that they are racially distinct groups, are protected under sections 1981 and 1982, two civil rights statutes derived from the 1866 Civil Rights Act.

Since lower courts are divided as to whether scientific classifications of race should be used in order to determine whether a particular plaintiff may state a claim under sections 1981 and 1982, or whether a broader test of racial discrimination should be used, we urge this Court to clarify this issue. A test of the coverage under these acts such as the one employed by the Third Circuit

in *Al-Khazraji v. St. Francis College*, which does not adopt a static system of racial classification is consistent with the legislative history and the previous interpretations of the statutes made by this Court. In addition, it is consistent with the purpose of the Act to ensure equal civil rights to all persons regardless of race or color.

ARGUMENT

I. The fact that an individual plaintiff is not dark in skin color or that he belongs to a group which is classified as "Caucasian" under one scientific system of racial classification should not present a barrier to stating a cause of action under sections 1981 and 1982, since these statutes prohibit all acts of discrimination which are racial in character.

No static system of racial classification can be drawn from the language and legislative history of the statute, or from the scientific, popular or legal usage of the term "race." All of these sources indicate that the concept of "race" is flexible and that classifying persons according to race should not be the basis for determining coverage under these statutes. Even assuming that such a system of racial classification could be ascertained, the public interest calls for courts to refrain from subjecting victims of discrimination to racial tests, whether based on physical characteristics, ancestry, or appearance, for the purpose of determining whether their claim can be heard. The correct standard is whether the acts of discrimination are "racial" in character, *i.e.*, whether they are based on the categorization of the victim as a member of a group sharing certain immutable characteristics.

Claims brought by Arabs, Jews and other minority groups under sections 1981 and 1982 have been dismissed by some courts as not stating a cause of action for race discrimination because such groups are not distinct "races", or because plaintiffs are not of a different skin color from defendants. The Third Circuit Court of

Appeals was correct in rejecting such arguments in the *Al-Khazraji* case. However, other courts, such as the Fourth Circuit in the *Shaare Tefila* case, have incorrectly adopted such a biologically-based notion of "race" to exclude plaintiffs who are Jews, Arabs, or members of some other group not falling within a scientifically recognized racial category from the coverage of this Act. This flies in the face of the legislative history, as well as the actual dynamics of racial discrimination, which is not based strictly on biological criteria.

This court has not previously had occasion to deal with claims brought by persons who are Caucasian, but are perceived by defendants as "non-white" or of a distinct race. However, in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287 (1976), this Court construed the addition of the phrase "as is enjoyed by white citizens" in these statutes in accordance with statements in the Legislative history to have been a technical correction meant to indicate that the statute is racial in character and would not apply to discrimination against women and minors. Rep. Wilson, who proposed the amendment explained that: "It was thought by some persons that unless these qualifying words were incorporated in the bill, those rights might be extended to all citizens, whether male or female, majors or minors.", Cong. Globe, 39th Cong., 1st Session 157 (1866). This Court further stated that the statute was not meant only to protect blacks, but to protect all persons from racial discrimination.

Lower courts which have attempted to articulate a definition of "race" for purposes of determining applicability of these statutes in cases such as *Al-Khazraji* and *Shaare Tefila* have generally found that establishing a fixed definition of race is impossible, because the groups defined as distinct races vary considerably in the scientific, popular, and legal usage of the term. There is not now and was not in 1866 anything approaching

a consensus as to the meaning of race.[1] Even if a static, scientific definition of race were accepted, intermixture of population groups and environmental factors cause changes in the physical characteristics of populations. Similarly sociological factors cause popular conceptions of race to change. Today, many anthropologists denounce the concept of race because of its use as a justification for discrimination against ethnic groups. The Nazi's use of racial stereotypes to promote the "Final Solution" made the horrible potential for misuse of racial terminology apparent.

A view which has gained some influence in the lower courts, is that coverage extends to groups who are discriminated against based on a common understanding that they are of a distinct or "nonwhite" race, and are therefore erroneously believed to share certain immutable characteristics. In view of the fact that Al-Khazraji, unlike some Arabs, is dark in skin color and alleged discrimination on this basis, the court's decision could also have been supported by cases involving Arab plaintiffs which have held this more restrictive view that only dark-skinned Arabs may state a claim under section 1981.[2] However, the Third Circuit correctly chose not to adopt such a restrictive reading.

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[1] One nineteenth century scientific system contained 29 races; another lister four. See Dictionary of Races or People, S. Doc. No. 662, 61st Cong., 3d Sess. 3 (1911)—quoted in Greenfield & Kates, "Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866", 63 California Law Review 662 (1975).

[2] See *Abdulrahim v. Gene B. Glick*, 40 FEP cases 481 (N.D. Indiana, 1981) (Plaintiff of Palestinian or Syrian origin can sue under section 1981 for race discrimination where it is alleged that his skin color is such that he can be considered "non-white"); *Saad v. Burns*, 456 F. Supp. 33 (D.D.C. 1978) (Arab plaintiff directed to file more definite statement alleging race or color discrimination under section 1981, since it is insufficient merely to state that the plaintiff is "non-Caucasian"); *Ibrahim v. New York State Department of Health*, 581 F. Supp. 228 (E.D. N.Y., 1984)

The only other case which has dealt with a claim under these statutes on the basis of discrimination against Arabs was a recent 5th Circuit case, *Alizadeh v. Safeway Stores*, 802 F.2d 111 (5th Cir. 1986) which actually involved a woman who was married to an Iranian[3] who sued her employer, because she felt that she had been discriminated against because her husband was considered non-white. The court construed this as a claim involving Arab discrimination and held that such a claim is cognizable under section 1981 where Arabs are discriminated against by people who believe that they are of a nonwhite race.

The proper inquiry, as indicated by this Court in its previous decisions, is whether the discrimination is racial in character not whether the discriminatee or the group to which he belongs is racially distinct from white persons on the basis of some objective test of race. The *Al-Khazraji* and *Alizadeh* courts are correct that looking for a scientific definition of the term "race" to determine the coverage of the 1866 Act is fruitless as there are thousands of definitions of this term. G. Simpson and J.

(court granted motion to dismiss employment discrimination claim of Arab plaintiff under section 1981 since Arabs are not a "race" for the purposes of this statute. The court implied by relying on *Saad, supra*, that an allegation of color discrimination would be sufficient to state a claim.); *Anooya v. Hilton Hotels*, 733 F.2d 48 (7th Cir. 1984) (Section 1981 held inapplicable to claim by plaintiff alleging discrimination based on his "Iraqi origin" because no allegation of racial animus was inferable from the pleadings. The Court, however, noted decisions of this Court which have indicated that race and color claims are cognizable under section 1981).

[3] Iranians are not Arab, but the court discussed the case as if it involved discrimination against Arabs. This is actually a common misperception. While it is not clear from the opinion, defendants may very well have thought that plaintiff's husband was an Arab as well. See S. Slade, "The Image of the Arab in America. Analysis of a Poll of American Attitudes" 35 Middle East Journal 143, 148 (1981). 70% of Americans who responded to a 1980 poll by a private research organization believed that Iran is an Arab country.

Yinger, Racial and Cultural Minorities: An Analysis of Prejudice and Discrimination" (1965), indicates that biological theories of race vary from the traditional view based on skin color to endocrine theories based on the thyroid gland.[4] Popular conceptions of race are similarly subject to change.

Any test of whether plaintiffs are "racially distinct" would necessarily be based on anthropological criteria which, besides being beyond the expertise of courts, are subject to change and disagreement in the scientific community. In fact, as noted above, many anthropologists have denounced the concept of race, recognizing the danger of such concepts being used as a justification for discrimination based on the erroneous notion that genealogical and physiological "racial" distinctions can be used to rank the "races" in some kind of hierarchy of value based on "immutable" psychological and sociological characteristics attributed to the "racial" groups.[5] Ironically, it was primarily the perversion of the race concept by the Nazi Party in Germany and the tragic result of this stereotyping of Jews and other groups which led many anthropologists to abandon racial classification,[6] and yet some courts such as the Fourth Circuit in *Shaare Tefila* refuse to recognize this type of discrimination as "racial" in character, because Jews do not fit into a biologically-based definition of race. Racism is not based on an objective biological classification of the races, it is based on a perversion of scientific concepts of race

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[4] R. Tekiner, "Jewish Nationality Status as Basis for Institutionalized Racial Discrimination in Israel", 17 Arab American Affairs 79.

[5] A. Littlefield, *et al.* 2 and 3, Redefining Race: The Potential Demise of a Concept in Physical Anthropology (1982). A survey of physical anthropology texts revealed that the no-race view was most prevalent by the end of 1970.

[6] Anthropologist Ashley Montagu recommended substituting "ethnic group" for "race" because people have fixed, false ideas about the meaning of race. A. Montagu, Man's Most Dangerous Myth: The Fallacy of Race (1946).

which uses a facially objective and scientific language to disguise a value system ranking groups of people into those of higher or lesser orders.

Popular concepts of race tend to confuse biology and culture while scientific use of the term remains strictly biological. Many writers who promoted the idea of racial superiority adopted anthropological language and created the impression that anthropologists approve of attributing psychological characteristics to races even though anthropological race classifications are actually based on physical characteristics. Such writers also attached labels to races misrepresented as valid scientific terms, such as "Aryan" and "Semitic" which are actually linguistic terms.[7]

Defendants in both *Al-Khazraji* and *Shaare Tefila* argued that plaintiffs who were Arabs and Jews were barred from stating a claim of racial discrimination under sections 1981 and 1982 because both plaintiffs and defendants were "Caucasian". The system of racial classification which divides people into one of three groups, Caucasoid, Negroid, or Mongoloid, is not now and was not in 1866 the only scientific system of classifying races. There is absolutely no indication in the legislative history or in the language of the statute which suggests that Congress intended to adopt this definition of the term "race". In fact, the term "race" does not even appear in the statutes. This court has construed the "white citizens" language in the statute to merely emphasize the racial nature of the rights guaranteed. The legislative history, in fact, indicates that the bill was meant to be broader than merely a protection of the civil rights of blacks.[8]

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[7] See R. Tekiner, Jewish Nationality Status as the Basis for Institutionalized Racial Discrimination in Israel" 17 American Arab Affairs 79 (Summer 1986).

[8] Senator Trumball who introduced the bill stated that "this bill applies to white men as well as black men. It declares that all

Moreover, the term "Caucasian" has not been used with precision, it has frequently been used to refer to persons with white skin color. Some Arabs and others who would technically be classified as "Caucasian" have dark skin color, and as a result there has been much confusion over whether such "Caucasians" who are dark in skin color (like Al-Khazraji) can sue other "Caucasians" under sections 1981 and 1982.

Legal definitions of race, like scientific and popular conceptions of the term, have varied widely and skin color and membership in the Caucasian race have never been consistently applied criteria. In *Lee v. New Orleans Great Northern Railroad Co.*, 125 La. 236, 51 So. 182 (1910) in which a white plaintiff sued a railroad for damages for assigning his two daughters to a "colored" coach, the court observed that "On the question of race, there is no legal presumption either way. The issue was one purely of fact, to be determined not only by evidence of the admixture of Negro blood, but by evidence of reputation, of social reception, and of the exercise of the privileges of the white man." 51 So. at 184. In *Gong Lum v. Rice*, 139 Miss. 760, 104 So. 105 (1925), a Chinese girl was prohibited from attending a white school, under a state constitutional provision that "(s)eparate schools shall be maintained for children of the white and colored races." The court discussed the term "white" as follows: "So far as we have been able to find, the word 'white' when used in describing the race is limited strictly to the Caucasian race, while the word 'colored' is not strictly limited to Negroes or persons having Negro blood." 104 So. at 108.

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persons in the United States shall be entitled to the same civil rights . . . ." Cong. Globe, 39th Cong., 1st Sess. 599 (1866). Senator Trumball also indicated that the act would "undoubtedly" cover gypsies, a group which would also fall under the classification of "Causasian" (*id* at 498), and there was discussion of whether the "German race" would be covered, indicating that Congress did not intend to adopt this three-race system of racial classification (*id.* at 4294).

Definition of "race" in state statutes and constitutions has varied widely both in terms of the persons included within particular racial groups and the groups affected. Constitutions and statutes of a particular state may even have defined the membership of certain racial groups differently depending on the purpose for which the classifications were used, e.g., some states had different definitions of race for purposes of concubinage or miscegenation statutes and statutes requiring racially segregated facilities.[9]

Legal tests of racial classifications are also instructive in terms of determining whether racial classifications based on physical characteristics should be used by the courts to decide whether a plaintiff can state a claim under sections 1981 and 1982. Statutory definitions of race were usually based on an individual's "blood", ancestry, appearance, or a combination of these factors. Tests based on "blood" were divided into the so-called proportion or percentage test and the ascertainable trace test. Ancestry-based tests usually provided that a person should be deemed a member of a (nonwhite) racial group if he has an ancestor who was a member of that group within a specified number of generations removed. Appearance-based tests were generally used for purposes such as enforcing laws providing for segregated facilities where a quick appraisal of physical appearances was necessary.[10]

Given this confusion in the definition of "race", it should not be the touchstone of coverage under the Civil Rights Act of 1866.

II. Claims by Arab or Jewish plaintiffs should not be considered to be based on national origin or religion rather than race, as a matter of law.

An allegation of racial discrimination under section 1981 or 1982 on the basis of Arab of Jewish origin

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[9] See Legal Definition of Race, 3 Race Relations Law Reporter 571, 572.

[10] *Ibid.* at 573.

should be sufficient to survive a motion to dismiss. As demonstrated in section three below, both of these groups are subject to discrimination which is racial in character. Although national origin or religious discrimination may in some cases be so closely intertwined with race discrimination that the two are indistinguishable, whether elements of racial discrimination are present in a particular act can only be determined on a case-by-case basis.

Courts faced with employment discrimination claims by Arab plaintiffs often have erroneously viewed them as national origin claims, suitable for consideration under Title VII rather than section 1981. Similarly, there is a tendency to assume that claims brought by Jewish plaintiffs must necessarily be based on religious discrimination and so are not enforceable under §§ 1981 & 1982.

The matter of whether nationai origin discrimination is cognizable under sections 1981 and 1982 has not been definitively decided, although this court has indicated in dicta that it is not.[11] However, some courts have held that national origin claims are cognizable under these statutes, where there are some elements of racial discrimination.[12]

Some courts and commentators have even stated that the fact that these claims may be cognizable under

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[11] In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968), this court said in dictum that section 1982 reached only racial discrimination as distinguished from religious or national origin discrimination, and lower courts have generally held that national origin discrimination is not covered, see *e.g. Budinsky v. Corning Glass Works*, 425 F. Supp. 786 (W.D. Pa. 1974) (Slavic Americans); *Kurylas v. Department of Agriculture*, 373 F. Supp. 1072 (D.D.C. 1973) (Polish Americans).

[12] See, e.g., *Gonzales v. Stanford Applied Engineering*, 579 F.2d 1298 (9th Cir. 1979) (brown Mexican-Americans); *Enriquez v. Honeywell, Inc.*, 431 F. Supp. 901 (W.D.Okl. 1977) (Americans of Spanish descent); *Khawaja v. Wyatt*, 495 F. Supp. 302 (W.D.N.Y. 1980) (Pakistani).

Title VII somehow has some bearing on whether a claim can be brought under section 1981. This is an erroneous argument since the issue is the intent of Congress in passing section 1981 rather than what is covered by other statutes.

It is possible that elements of both racial and national origin discrimination may exist in the same situation. It is erroneous for courts to simply assume that an Arab or a Jew can only be subject to national origin or religious discrimination. Allegations by these groups of racial discrimination should be enough to survive a motion to dismiss; the nature of the claim can only be ascertained by examining the facts of a given situation. The confusion between race and national origin is aggravated by the fact that the precise definition of "national origin" is also unclear.

Title VII, in fact, does not define the term "national origin." However, there was some discussion of the term in the legislative history. Congressman Dent (D. Pa.) stated that: "National origin, of course, has nothing to do with color, religion, or the race of an individual. A man may have migrated here from Great Britain and still be a colored person.[13] In *Espinoza v. Farah Manufacturing Company*, 414 U.S. 86, 6 FEP 933 (1973), in determining whether a refusal to hire on the basis of citizenship constituted a national origin claim, this court defined national origin as "the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Id.* It will often be difficult to distinguish between national origin and race in particular cases since they will often be intertwined; however, a strict national origin claim is possible where a person is discriminated against solely because of the country from which he comes.

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[13] 110 Cong. Rec. 2549 (1964), quoted in Schlei and Grossman, p. 305.

Many incidents of violence and harassment directed at Arabs have occurred in response to events taking place in the Middle East such as the recent U.S. raid on Libya. Perhaps if such incidents were directed solely at Libyans, one could argue that they were based on national origin. However, every Arab and Arab-American is threatened by such senseless violence. In 1985, during the TWA hostage crisis in Lebanon, the Dar as-Salaam Mosque was severely damaged by two pipe bombs. The Islamic Society of Greater Houston, where this mosque was located, had received numerous threatening phone calls during this and other crisis situations in the Middle East. Sayed Gomah, Director of the Society, expressed his frustration at the recent Congressional subcommittee hearings on violence against Arab-Americans: "Despite our establishment in American Society as a religious entity . . . we are constantly viewed as a political entity responsible for the world's problems. When the U.S. Embassy in Tehran was taken, we were Iranians. When the Marine barracks were bombed, we were Lebanese. When the Achille Lauro was hijacked, we became Palestinian. When TWA Flight 847 was held, again we were Lebanese. Most recently, when the Gulf of Sidra became the target, we were declared Libyans." (House Committee on the Judiciary, Subcommittee on Criminal Justice, Congressional Hearings on Ethnically Motivated Violence Against Arab Americans, July 16, 1986)

As indicated by Sayed Gomah, anti-Arab discrimination is indiscriminately directed at all Arabs despite their particular national origin. As with the desecration of the Shaare Tefila synagogue, these acts are often motivated by hatred of Arabs and Jews as groups rather than by the victims' religious beliefs or practices, or national origin. The Shaare Tefila congregation was clearly not discriminated against because of their religious practices or beliefs. The 1972 amendments to Title VII added section 701(j) defining religion: "The term 'religion' includes all aspects of religious observance and practice, as

well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employee's business." The slogans painted on the synagogue clearly indicated that the perpetrators took their inspiration from the Nazi anti-Semitic attitudes based on erroneous concepts of racial inferiority. As the history of Nazi Germany proves, such feelings of hatred are not abated by religious conversion or suppression of religious practices. The Nazis attempted to identify persons with "Jewish blood" by investigating geneological records, even if such persons did not practice the Jewish religion.

III. Arabs and Jews are perceived by some people, as "racially" distinct, and have been the object of racial caricatures and steretoypes, which encourage and are used to justify discrimination. The civil rights of Arabs and Jews are endangered and will be diminished if they are not deemed to be within the protection of these statutes.

Clearly acts of discrimination against Arabs and Jews, such as those which occurred in the two instant cases are not based on some bizarre notion of race unique to the defendants. However, regardless of what precise percentage of the population holds such views, they present a palpable danger to the civil rights both of the victims and of other members of these groups, whose free exercise of their civil rights is "chilled" by the fear of racial violence, harassment, and discrimination.

Arabs and Jews have both historically been considered distinct groups or "races" and have been subject to discrimination on the basis of this perception. Both analysis of media coverage and attitude polls indicate a high frequency of stereotyping and negative images of Arabs.[14]

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[14] See S. Slade, "The Image of the Arab in America: Analysis of a Poll on American Attitudes" 35 Middle East Journal 143, 147-48 (1981). Results of a 1980 poll of American attitudes towards Arabs

In fact, the stereotypes of Arabs which are currently prevalent in the American media and society are similar to earlier stereotypical representations of Jews in Nazi Germany and elsewhere. Such attitudes indicate a climate favorable to discrimination which is racial in character.

Racism against both Arabs and Jews is often based on the erroneous linking of culture and biology.[15] Arabs and Jews both fall into the category of "Semitic," although the term "ant-Semitism" is now commonly used to designate a racist attitude against Jews. This 19th Century classification was actually linguistic, but also formed the basis for a racial theory.[16] Professor Edward Said has said that, "In the West, the Arab is frequently presented as a menace, a terrorist, a shadowy figure who

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indicates that a large percentage of Americans consider Arabs to be "barbaric/cruel" (44%), "treacherous/cunning" (49%) and "warlike/bloodthirsty" (50%). A large percentage view most Arabs as "anti-Christian" (40%). All of these traits imply hostility. In addition, Arabs, like Jews, are subject to a steretotype based on the perception that they are rich and greedy.

[15] See T. Gossett, Race, the History of an Idea in America 11 (1963).

[16] See E. Said, Orientalism (1978) documenting intellectual history of Western view of Orient—particularly Arab world—traces racist ideas against Arab world back as far as Crusades e.g. at 172 quotes Chateaubriand—Crusades not just about "deliverance of the Holy Sepulchre" but about opposition to "cult systematically favorable to ignorance (Islam); to decadance, to slavery" documents links made by philologists between linquistics and anatomy e.g. "One sees that in all things, the Semitic race appears to us to be an incomplete race, by virtue of its simplicity. This race—if I dare use the analogy—is to the Indo-European family what a pencil sketch is to a painting; it lacks that variety, that amplitude, that abundance of life which is the condition of perfectability. Like those individuals who possess so little fecundity that, after a gracious childhood, they attain only the most mediocre viriilty, the Semitic nations experienced their fullest flowering in their first age and have never been able to achieve true maturity." Renan, Oevres Complete, 8:156 quoted at E. Said, Orientalism (1978) at 159.

operates outside of the accepted value systems and is therefore to be feared and mistrusted. This racist image of the Arabs is nothing more than the result of the transference of the popular anti-semitic animus from a Jewish to an Arab target." [17] Although Jews are not biologically a separate race, the Nazi attitude towards Jews was racist in that it defined them as separate from the "Aryan" race. The Nuremberg Laws in Nazi Germany defined Jews biologically. The treatment of Jews was not based on religious practice or belief, since the Nazis sought to identify Jews who had assimilated and converted to Christianity in order to "re-judaize" them. It also was unrelated to national origin, since Jews of German ancestry were equally subject to atrocities as Jews of other national origins such as Polish, French, or Hungarian.[18]

This legacy of racism inherited from the nineteenth century, is carried over into present day views towards Arabs. "[W]hat has not been sufficiently stressed in histories of modern anti-Semitism has been the legitimation of . . . atavistic designations by Orientalism, and more

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[17] Edward Said quoted in Nick Thimmesch "The Media and the Middle East" 2 American Arab Affairs 79, 85 (Fall, 1982). Elsewhere Said discusses the dynamics of racist thought: "Theses of Oriental backwardness, degeneracy, and inequality with the West most easily associated themselves early in the nineteenth century with ideas about the biological bases of racial inequality. Thus the racial classifications found in (the works of this period) found a willing partner in latent Orientalism. To these ideas was added second-order Darwinism, which seemed to accentuate the "scientific" validity of the division of races into advanced and backward, or European-Aryan and Oriental-African. Thus the whole question of imperialism as it was debated by pro-imperialists and anti-imperialists alike, carried forward the binary typology of advanced and backward (or subject) races, cultures, and societies. E. Said, Orientalism (1978) at 207.

[18] See Greenfield and Kates, "Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866" 63 California Law Review 662, 678.

important . . . the way this academic and intellectual legitimation has persisted right through the modern age in discussion of Islam, the Arabs, or the Near Orient. For whereas it is no longer possible to write learned (or even popular) disquisitions on either "the Negro mind" or "the Jewish personality", it is perfectly possible to engage in such research as "the Islamic mind," or "the Arab character." [19] In fact, content analysis of news coverage and monitoring of television has indicated that, at least since 1956 Suez crises, American media have broadcast a predominantly negative picture of the Arab personality.[20]

Many Arabs have physical characteristics such as darker skin color which make them readily distinguishable and, therefore more vulnerable to racial discrimination. However, these exterior, visible differences become symbolic of invisible characteristics attributed to the group. Some have referred to this as "social race." These characteristics erroneously attributed to the group are the source of racial stereotypes. The social judgments and discriminatory denial of civil rights which they foster are the evils which sections 1981 and 1982 were meant to eliminate, and it is only an appreciation of this fact which can lend meaning to the statutes,[21] and allow them to fulfill the purpose expressed in the language and legislative history: to protect the civil rights of all persons regardless of race or color. In order to appreciate the inappropriateness of making color and other physical characteristics the determinants of coverage, one need only imagine the type of discrimination suffered by plaintiffs in the *Shaare Tefila* case as directed against Arabs, Hispanics or some other group referred to as a "race" whose members differ in skin color and other physical

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[19] E. Said, Orientalism (1978) at 262.

[20] *Ibid.* N. Thimmesch.

[21] *Ibid.*, Greenfield and Kates, at 679-680.

characteristics. If a mosque or Arabic cultural center were defaced with racist slogans and symbols as was the Shaare Tefila synagogue, would only those victims who can pass a test of skin color or some other physical trait be allowed access to the court in order to state their claim?

One need not merely imagine this situation, as violence and harassment of Arabs has been on the increase in recent years. In fact, the ADC has first-hand experience with this phenomenon since it has recently been a target of several violent incidents. The FBI has indicated that it believes that these and other acts of violence against Arab-Americans were motivated by anti-Arab animus. Alex Odeh, Regional Director of the ADC in Los Angeles, was murdered on October 11, 1985 when a bomb rigged to the door of the ADC office exploded as he arrived for work. In addition, on August 16, 1985 two Boston police officers were seriously injured when attempting to defuse a bomb left outside the ADC office in that city, and on November 29, 1985 the Washington, D.C. office was damaged by an arson attack. Other Arab-Americans have also been victimized by violence. Earlier this year on May 27, Professors Ismail and Lamya al-Faruqi were brutally murdered when they and their pregnant daughter were attacked at home in the middle of the night by an unknown assailant. The al-Faruqis were world renowned experts on Islamic thought and Arabic culture. The gravity of the situation is evident in the statement of FBI director William H. Webster delivered before the House Committee on the Judiciary on February 28, 1986, that the FBI considers the potential for violence by extremist groups against Arab-Americans to be quite high. On another occasion, Webster, in a speech at the National Press Club, said that Arab-Americans have entered a "zone of danger." [22]

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[22] "FBI Chief Warns Arabs of Danger", *The New York Times*, December 11, 1985, at p. A19.

Both Jews and Arabs, are victims of hate and violence. The rhetoric of extremist groups with an anti-Jewish bias, such as the Ku Klux Klan and Neo-Nazi organizations, are paralleled by that of anti-Arab extremist groups such as the Jewish Defense League and the Jewish Defense Organization. Jews and Arabs should be afforded the protection of these Civil Rights Act because they have been and are still perceived by some to be "racially" distinct groups, and because they are victimized by violence and discrimination based on this perception. How widely such views are held or how frequent the incidents of violence occur is not the point. These incidents are no less grave to their victims, and no less based on racial grounds, regardless of whether the majority of the population holds these ideas.

It has been said that a subjective test of defendant's belief that plaintiffs belong to a distinct race would open the courts to litigation based on defendant's irrational conceptions of race not tied to any common understanding of the term. In the instant cases, the racial animus in discriminating against Arabs and Jews is not derived from some unique notion concocted by defendants. In such cases, the subjective belief of defendants is connected to an external racist ideology. As discussed above, there is a perception held more widely than by these defendants that Arabs and Jews are racially distinct groups. It should not be required that the racist perceptions of the group be so common that they are shared by most people, or so acceptable that they are frequently expressed openly. An allegation of racial discrimination on the basis of the fact that plaintiff is an Arab or a Jew should be sufficient to survive a motion to dismiss. Whether or not racial discrimination has actually occurred can only be determined by a review of the facts of each individual case. Such an approach would maintain the racial standard articulated by this Court, and yet employ the standard flexibly enough to deal with the realities of racial discrimination.

CONCLUSION

For the foregoing reasons, the amicus urges the court to affirm the decision of the Third Circuit, to reverse the decision of the Fourth Circuit, and to resolve these cases in a manner such that it is clear that the protection of these statutes is available to all Arab and Jewish victims of racial discrimination.

Respectfully submitted,

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